89-1846

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Mark L. Schwarcz, Petitioner

v.

Harriet B. Schwarcz, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA, PHILADELPHIA OFFICE

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QUESTIONS PRESENTED

1. Should not judges be bound to the same rules of judicial conduct and trial procedure regardless of the nature of the case? ("In any custody case, there has to be a certain amount of hearsay"--- quote by trial Judge.) What degree of demonstrable error should require reversal?
2. Should not the standard of judicial behavior be the same whether a party is represented by counsel, or is representing himself pro se?
3. Does an order by the trial judge to a party or counsel for a party not to raise objections to improper evidence create error on its face? Does a party or his counsel waive an objection to improperly introduced evidence by failing to object to such evidence after such an order?
4. Does not the Equal Protection Clause of the U.S. Constitution require that fathers be granted equality in practice in custody cases, as well as in theory?

5. Should an appeal of a Superior Court decision evaluate not only the surface logic of the Superior Court, but also the equal treatment of the litigants by the Superior Court?

6. a. Are there Constitutional limitations on the authority of trial courts in custody cases to mandate psychological treatment of the parties?

   b. When a party in a custody case accepts psychological counseling as ordered by a trial court, and attends such sessions, should not a decision in such a case based in part on the alleged degree that the party refused to submit to treatment be overturned for Constitutional reasons?

7. When a party in a custody case waives objections to alleged prejudicial actions by the court prior to the point in time of the objection, is it not serious error, justifying review by the United States Supreme Court, for an appellate court to hold that the party by doing so has waived his objections to all future

misconduct by the court? Did not the Superior Court of Pennsylvania err when it held that the Supreme Court of Pennsylvania, in Robinson v. Robinson, 505 Pa. 226, 478 A.2d 800 (1984), overruled a line of cases which held that the waiver doctrine does not apply to custody cases? Is not this error of law by the Superior Court of Pennsylvania of significant Constitutional dimension, justifying review by the United States Supreme Court?

8. Did the Superior Court of Pennsylvania err when it held that a lower court opinion in a custody case complied with Pennsylvania law requiring a complete and comprehensive opinion with a detailed analysis of the evidence presented by both parties, when appellant's evidence was almost totally ignored in the lower court opinion? Does not the due process requirement of the State and Federal Constitutions, as well as the equal protection clause of the Federal Constitu-

tion, require that in regard to litigation with the crucial social importance of a custody dispute, that the lower court provide a reasonably complete analysis of testimony of witnesses for both parties in its opinion, as well as an analysis of other evidence, in order to facilitate proper consideration of the lower court decision in the event of an appeal?

9. Is a party denied crucial Constitutional guarantees of due process and equal protection under the law when a trial court arbitrarily and without good cause halts a court proceeding in a custody case, without agreement of the parties, and delays resumption of the case for nine months? Does such a delay, with the associated distancing in time from a full relationship by the party not having temporary custody with his children, inherently prejudice the party without temporary custody?

10. Where a trial court in its opinion in a custody case strongly relies on a single expert, indicates its reliance by using exact language from the written report of that expert in framing judicial orders, and where the court quotes the diagnosis and recommendations of that expert in the written opinion of the court, must not the court also indicate in its opinion that it agrees with the diagnosis of the expert? Is reliance on the conclusion of an expert without an indication that the court accepts the diagnosis on which the recommendations of the expert are based a violation of the Constitutional due process and equal protection rights guaranteed to the party in question?

11. When a trial court cites inadmissable hearsay evidence in the written opinion of the court, does not the implied importance of the inadmissable evidence to the court in reaching its decision indicate that significant violations of due process rights have occurred?

LIST OF PARTIES

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The Opinion of the Court of Common Pleas of Montgomery County, Pennsylvania is included in the Appendix to this Petition at page A-1 to A-27. The Opinion of the Superior Court of Pennsylvania is included in the Appendix to this Petition at page A-28 to A-80. The Order of the Supreme Court of Pennsylvania is included in the Appendix to this Petition at page A-81.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Pennsylvania Superior Court in the case of Mark L. Schwarcz v. Harriet B. Schwarcz, filed by the Pennsylvania Superior Court on September 26, 1988 is invoked under 28 U.S.C. § 1257. The Pennsylvania Supreme Court thereafter denied a petition for ALLOCATOR on April 7, 1989. This petition for WRIT OF CERTIORARI to the Pennsylvania Superior Court is timely filed within 90 days of that date.

STATUTE INVOLVED

28 U.S.C. § 1257 (3). Final judgments rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

By writ of certiorari . . . where the validity of a State statute is drawn into question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States.

STATEMENT OF THE CASE

This case arises from cross custody cases of Harriet B. Schwarcz v Mark L. Schwarcz and Mark L. Schwarcz v Harriet B. Schwarcz. The trial judge, Joseph A. Smyth, entered an order on 11/16/87, in the Court of Common Pleas of Montgomery County, Civil, Nos. 85-10922 and 85-10945, awarding primary custody of the children to Harriet Schwarcz. Petitioner appealed to the Superior Court of Pa., which affirmed the order of the trial court on 9/26/88. Petitioner then filed a Petition for Allowance of Appeal from the Superior to the Supreme Court of Pa. Respondent's Petition was denied on 4/7/89.

Federal questions were raised by the unequal and prejudicial treatment of Petitioner throughout the trial of this case by the trial judge, violating his rights to due process and equal protection under the U.S. Constitution, as well as Petitioner's rights under the laws of the State of Pa. Federal questions were also raised by the failure of the Pa. Superior Court and Pa. Supreme Court to uphold Petitioner's rights under the U.S. Constitution as they applied to this case. (Some

specific examples: 1. On 1/7/86 (NT 227) the trial Court ordered Petitioner not to object to objectionable testimony which was being introduced into evidence. 2. The Opinion of the trial Court lacks almost any comment as to the testimony or credibility of any of father's witnesses, in violation of Pa. law as well as rights guaranteed under the U.S. Constitution. 3. Objectionable hearsay evidence was permitted into evidence as a matter of course over the objections of Petitioner and his counsel. (See for example NT 125, 4/9/87; NT 165, 4/6/87; NT 138, 4/6/87; NT 135, 4/6/87; NT 116, 4/6/87; NT 128 and 132, 4/6/87.) 4. The trial was interrupted for 9 months, without the consent of Petitioner and prior to presentation of Petitioner's case, while the Petitioner was ordered by the trial court to submit to therapy. This delay severely prejudiced Petitioner, and was contrary to state law, which does not authorize a trial judge in a custody case to order a party to undergo therapy.)

REASONS FOR GRANTING THE WRIT

I. Issues Presented for Review

A. Should not judges be bound to the same

rules of judicial conduct and trial procedure regardless of the nature of the case? ("In any custody case, there has to be a certain amount of hearsay" - quote by trial Judge.) What degree of error should require reversal?

Numerous cases have cited the basic principle that judges must at all times conduct proceedings fairly and impartially, and show no prejudice against either party. A careful reading of appellate decisions where one party has alleged bias on the part of the trial judge quickly reveals, however, that appellate courts are extremely reluctant to find prejudice in a trial judge's behavior or decision making. Only a small percentage of cases where error was alleged in the denial of a recusal motion result in reversal, and these are cases where the prejudice is so obvious that not to recognize the bias could quickly undermine public confidence in the judicial system. (These cases include trials in which a judge used derogatory racial or religious epithets to a party, or displayed the most obvious favoritism not only in decision making, but in statements from the bench.)

It is respectfully submitted that maintain-

ing a legal system which is respected by the public over the long term, as well as basic due process requirements, requires a much stricter standard than that which exists in practice. Judicial prejudice is far more often subtle than blatant, but the damage in respect to public confidence in the judicial system can be equally as severe from one as from the other over a long period of time.

Hearsay rules and other evidentiary standards should not be viewed by the court as a vehicle for the expression of artistic license. An evidentiary rule has the force of any other law, and can determine the outcome of a trial. Factors such as time constraints, an evaluation by the court of the degree of damage likely to occur if a rule is "bent," the mood of the court, or the court's emotional reaction to the parties or their counsel should play no role whatsoever in ruling on a hearsay objection or any other decision.

Where prejudice by the court can be demonstrated by inequality in the treatment of the parties (e.g., in allowing a witness to testify regarding an issue which the court refused to allow a witness for the opposing party

to address), or by a "relaxation" of evidentiary rules (e.g., permitting a witness to testify regarding what that witness was told by another individual because "the kind of case, i.e. a custody trial, always includes a certain amount of hearsay." The prejudice is compounded where the judge refers to the hearsay in his opinion, proving that the hearsay was an important factor in the case in determining the decision reached by the court.) or by any other relatively subtle but demonstrable ruling or act, an appellate court should find error in the denial of a recusal motion. The minimum standard for the degree of prejudice on the part of the trial judge requiring reversal should be any demonstrable degree of bias; not gross or blatant prejudice. (Indeed, appellate courts should reverse where prejudice is strongly suspected, even if it cannot be proved). No prejudice should be allowed to mar a court proceeding. A little "poison," in the sense of judicial unfairness, even if less than blatant, should not be tolerated by the appellate courts for the sake of expediency. The evenhanded concept of justice is so essential to the concept of American jurisprudence,

and critical to maintaining confidence in the legal system, that any deviation from equality of the parties in their treatment by the trial court should result in reversal.

It is suggested that in practice this even-handed approach is often lacking to some degree on the part of the trial court. Every attorney has experienced judicial decision making which is not merely inequitable, but arbitrary and grossly unfair. Too often the attitude exists on the part of the trial court that its decisions should not be challenged, and that the law is subject to the personal interpretations and even whims of this court.

It is suggested that the critical issue of judicial impartiality is of such importanee, and so long neglected by the Supreme Court as an issue addressed in its opinions, that fundamental policy reasons suggest that this issue be addressed by this Honorable Court.

B. Should not the standard of judicial behavior be the same whether a party is represented by counsel, or is representing himself?

The standard of judicial impartiality should not be affected by the fact that a party has determined to represent himself. There

are no requirements that a party must hire an attorney. Trial procedure and evidentiary rules must remain the same in a trial in which a party has decided to represent himself.

C. Does an order by the trial court to a party or counsel for a party not to raise objections to improper evidence create error on its face? Does a party or his counsel waive an objection to improperly introduced evidence by failing to object to such evidence after such an order?

A critical function of counsel is to protect his client by objecting to the introduction of improper evidence by the opposing party. Counsel also serves as an officer of the court, however, and has a compelling duty to obey a direct order from the bench. An order to counsel by the trial judge not to object to the introduction of evidence counsel believes to be inadmissable under the rules of evidence directly prevents counsel from carrying out his responsibilities to his client.

The situation created by such an order by the trial court inherently severely handicaps counsel in effectively representing his client regardless of what course of action he

chooses. The prejudice created to the client is the most fundamental possible in a system which depends for its proper functioning on the regulation of the admission of evidence according to the appropriate rules of law. Direct disobeying of such an order by counsel is likely to further antagonize the bench and prejudice the court against his client, as well as violate his duty as a court officer, while obeying the order can lead to the improper admission of evidence.

At a minimum, due process requires that counsel not be deemed to have waived his objections to improperly introduced evidence when functioning under the duress caused by such an order.

D. Does not the Equal Protection Clause of the U.S. Constitution require that fathers be granted equality in practice in custody cases, as well as in theory?

The traditional view that mothers are inherently more capable of parenting small children has been changed by law in many states, including Pa., as a result of State and Federal Constitutional requirements. The practice of favoring mother in custody cases,

however, continues even as Courts pay lip service to the new view that parents are on an equal legal footing in custody disputes.

Each case offers a Court opinion which argues that the case at hand is unique and states the Court has shown no gender bias. Yet the bottom line remains: the overwhelming favoritism shown by Courts to mothers in custody cases. Statistically, a woman is much more likely to win custody, even in the situation where the father has equal or superior parental qualifications. (There is strong precedent for a statistical approach to evaluation of lower court decisions in the U.S. Supreme Court. For example, a primary reason for the reevaluation of the death penalty was a statistical analysis which conclusively showed that a black man was far more likely to be executed for a given crime than a white man. Undoubtedly no Court opinion exists which cites the defendant's race as a reason for arriving at the conclusion that the death penalty is appropriate - yet the statistical analysis proved that race was a critical factor. The analogy to the continued favoring of mothers over fathers in custody cases in the

face of Constitutional requirements mandating a sex-neutral view is unmistakable).

Psychological studies have established the critical role of a father in the healthy raising of children, and proved that fathers are as effective and nurturing in the role of primary parent as mothers are. The law has translated this state of practical equality into a legally mandated equality. The U.S. Supreme Court should put trial courts on notice that practice must reflect the law.

E. Should an appeal of a Superior Court decision evaluate not only the surface logic of the Superior Court, but also the equal treatment of the litigants by the Superior Court?

Constitutional requirements of due process and equal protection are frequent considerations in evaluation of trial court opinions. Surprisingly, an evaluation of whether appellate decisions are bias free and written with an objective freedom from prejudice toward either litigant is almost never made.

It is obvious that it is as important on the appellate level as on the trial level for a Court to approach a case with an absence of

favoritism toward either party. Unfortunately, legal logic can obscure the fact that it is all too easy for an Appellate Court to make a decision in favor of one party, and then form the train of legal reasoning that justifies the decision. It is essential to evaluate an Appellate Court decision on a deeper level than its surface logic to determine whether it was truly fair.

When an Appellate Court reviews a brief with numerous arguments, each with carefully documented supporting evidence and logic, and each is perfunctorily dismissed by the Appellate Court, the proposition must be considered that the decision of the Appellate Court was the result of prejudging the case, and that the Court Opinion is essentially a sham.

In the case at hand, the appellant presented nine carefully reasoned issues, supported by numerous citations and a 61 page brief. The Superior Court of Pa. ignored the logic supporting appellants' positions, and arbitrarily ruled in appellee's favor on each argument, without careful consideration of father's position. A careful reading of the brief of appellant in conjunction with the

Opinion of the Pa. Superior Court shows that in spite of the length of the Opinion, Appellant's positions, which had obvious and considerable merit, were dismissed without serious consideration.

Appellant's strongest arguments were ignored by the Pa. Superior Court in its Opinion. Hearsay was permitted into evidence not merely as a result of mistake on the part of the trial judge, but as a matter of stated policy: the trial court was frank about this, and stated "In any custody case, there has to be a certain amount of hearsay. And I'm allowing certain things to continue the flow of the case. . ." (NT, trial, p. 245). This extraordinary statement by the trial court was completely ignored by the Superior Court in its Opinion.

The Superior Court completely misquoted the Opinion of the trial court in the most critical element of the case when it found on page 45 of its opinion that the trial court concluded that appellant is not "fit." (This "finding" by the Superior Court in its opinion was in direct contradiction to a comment made by one of the Superior Court Justices to ap-

pellant at the oral argument of the appeal of the decision of the lower court. This Justice stated to appellant, who was representing himself pro se, that "no one suggests that you are an unfit parent." It should be noted that the presiding Justices also indicated at this hearing that they had already reviewed the briefs of both parties, which included the opinion of the lower court, prior to the oral argument. It is also respectfully suggested that this internal contradiction by the Superior Court suggests a bias against appellant). In fact the trial court never stated that appellant was an unfit parent, and the inference that this may have been implied by the trial court is absurd and completely unwarranted.

In any event, a determination by the trial court that appellant was an "unfit" parent (which was never made) would have been an extreme and abusive denial of appellant's due process and equal protection Constitutional guarantees. The trial Court made some relatively minor criticisms of father's manner of disciplining the children and ability to control his emotions in supporting the court's

decision to award custody to mother, and never commented on "fitness," which is a legal determination critical for "eligibility" for custody. This contrasts with cases cited in appellant's brief where a parent was found to be fit in spite of problems which would raise a question in the mind of any reasonable person whether the individual in question should be allowed to raise a child. Some examples of persons who were found to be "fit" parents under Pa. law include: 1) In Com. Ex. Rel. Gorto v Gorto, Pa. Super., 444 A.2d 1299 (1982), a mother who had a theft conviction, a history of "occasional" institutionalization for psychiatric problems, who required psychiatric treatment and had a psychiatric prognosis described as "guarded" was determined to be a fit parent. 2) In Com. Ex. Rel. Witherspoon v Witherspoon, Pa. Super., 384 A.2d 936, a father who had convictions for aggravated robbery and fraudulent use of credit cards, as well as an arrest on a rape charge, was found to be a fit parent and was awarded custody of his two young sons.

F.1. Are there Constitutional limitations on the authority of trial courts in custody

cases to mandate psychological treatment of the parties?

Statutes in numerous states permit trial courts to order counseling of the litigants in custody cases. Undoubtedly, advice by professionals can be profitable to an open minded individual. A completely different issue is posed, however, when a statute allowing a trial court to authorize counseling is interpreted to permit the lower court to require psychological treatment of a party, such as psychotherapy.

An evaluation by a trial court in a custody case that a party has sufficient psychological problems to require medical treatment has major Constitutional implications. The function of the Court in the Anglo-American judicial system has been that of a neutral arbiter of disputes. While practice sets limits on the ideal of a hands-off approach, interference with the attitudes, personality, and mental functioning of a litigant is diametrically opposed to the proper role of the trial court.

Any psychological school, regardless of its approach, is not value-free. Each school, and

the numerous approaches differ widely in their theory and practice, has a value system which, to one degree or another, it imposes on its patients and clients. Requiring a litigant to subject himself to the underlying pressure of the Court to accept the values of the particular psychologist administering the treatment, given the importance to the litigant of the underlying case, interferes with the most basic freedom of the individual: to hold to his own beliefs, and attempt to assert, within the framework of the legal system, what he feels is correct and fair.

The abuse of such an order to the right of an individual to privacy, equal protection under the law, and due process is dramatic.

It is submitted that the potential for judicial abuse inherent in a statute requiring a party in a custody case to submit to psychotherapy is so great that such a statute should be held unconstitutional on its face. It follows logically that whenever a statute can be read to require counseling rather than psychotherapy, it must be so read because applicable rules of construction require that a statute be interpreted in a manner avoiding

a determination that it is unconstitutional. When a statute is specifically limited to authorizing a trial court to order counseling sessions for the parties in a custody dispute, with flexibility as to the subject matter of counseling sessions, it is serious error for an appellate court to broaden the interpretation of the statute to include psychotherapy. Such an issue has sufficient Constitutional implications of major importance to merit review by the U.S. Supreme Court.

F.2. When a party in a custody case accepts psychological counseling as ordered by a trial court, and attends such sessions, should not a decision in such a case based in part on the alleged degree that the party refused to submit to treatment be overturned for Constitutional reasons?

Psychotherapy requires trust and an open minded attitude. Requiring a particular state of mind of a patient in psychotherapy is not only illogical: it is an extreme abuse of judicial power, and an interference with the most basic freedoms of the individual: to have his own beliefs and principles, and practice his own code without interference by any

part of the government so long as he does not violate the rights of others. The abuse of judicial power inherent in such a decision by a trial court is compounded by a case where there is considerable disagreement among psychologists as to whether each others diagnosis and recommendations are correct or advisable, and where eminent psychologists acceptable to the party in question (who is ordered by the court to accept psychotherapy) are rejected by the court as candidate psychologists for that individual, and the actual treating psychologist is chosen by the court.

G. When a party in a custody case waives objections to alleged prejudicial actions by the court prior to the point in time of the objection, is it not serious error, justifying review by the U.S. Supreme Court, for an appellate court to hold that the party by doing so has waived his objections to all future misconduct by the court? Did not the Superior Court of Pa. err when it held that the Supreme Court of Pa., in Robinson v Robinson, 505 Pa. 226, 478 A.2d 800 (1984), overruled a line of cases which held that the waiver doctrine does not apply to custody

cases? Is not this error of law by the Superior Court of Pa. of significant Constitutional dimension, justifying review by the U.S. Supreme Court?

Elementary due process requires that a party to an action have an avenue to challenge judicial misconduct. Indeed, the Pa. Superior Court stated that in any litigation, "...the failure to preserve an issue on appeal will be excused if there is a strong public interest that outweighs the need to protect the judicial system from improperly preserved issues. See Reilly v Southeastern Pa. Transp., 507 Pa. 204, 489 A.2d 1291 (1985) at 1301. We recognize the strong public interest in maintaining the public's trust in the ability of our courts to decide cases without bias or ill will..."

The Superior Court of Pa. has also held specifically that the waiver doctrine is inapplicable in custody disputes. (See Gunter v Gunter, 240 Pa. Super. 382, 361 A.2d 307 (1976); In re Custody of Frank, 283 Pa. Super. 229, 423 A.2d 1229 (1980). It is a serious misinterpretation of Pa. Law to conclude that the line of cases referred to above

are overruled by the Pa. Supreme Court in Robinson v Robinson, 505 Pa. 226, 478 A.2d 800 (1984), which concerned a situation where the Superior Court of Pa. raised an issue sua sponte. The situation the Pa. Supreme Court confronted in Robinson v Robinson, supra, simply does not exist here: critical issues which the Superior Court of Pa. refused to confront, on the rationale that they were not properly preserved for appeal, were raised by appellant in his brief, as well as oral argument.

A custody case concerns issues of central importance to society: the relationships within the family, the rights of parents to raise their children, and the decision as to the most favorable way to raise children. An error of law, or a denial of due process or equal protection under the law in this area (the relationship within the family) affects issues of paramount importance to the social order, clearly justifying review by the U.S. Supreme Court.

H. Did the Superior Court of Pa. err when it held that a lower court opinion in a custody case complied with Pa. law requiring a

complete and comprehensive opinion with a detailed analysis of the evidence presented by both parties, when appellant's evidence was almost totally ignored in the lower court opinion? Does not the due process requirement of the Pa. and U.S. Constitutions, as well as the Federal equal protection clause, require that in regard to litigation with the crucial social importance of a custody dispute, that the lower court provide a reasonably complete analysis of testimony of witnesses for both parties in its opinion, as well as an analysis of other evidence, in order to facilitate proper consideration of the lower court decision in the event of an appeal?

It is an accepted rule of law in civil cases that the factual findings of the lower court will not be overturned on appeal unless they are clearly unreasonable. An appeal of an unfavorable lower court decision, however, is an absolute right of each litigant, guaranteed by accepted Constitutional interpretations. It follows logically that an appellate court must have the benefit of an opinion by the lower court which has a reasonably complete analysis of the evidence presented:

otherwise a proper review of the factual findings of the lower court is impossible.

The social importance of such a rule is particularly pronounced in custody cases, where the essential structure of the family is affected by the courts. The Supreme Court of the U.S. should place particular emphasis in choosing matters for review on those cases which present issues which impact on the structure of the family.

Pa. case law has recognized the importance of preserving the impression of the court, and weight given by the trial court to the testimony of witnesses for both sides in the formal opinion of the court. For example, in In re Custody of White, 411 A.2d 231 (1979), the Superior Court of Pa. remanded a case to the lower court when the trial judge failed to comment in his opinion on the testimony of neighbors of the parties, a babysitter, and a niece of a party. In Garrity v Garrity, 407 A.2d 1323 (1979), the Superior Court of Pa. reiterated in its holding the principle stated in prior cases that a detailed analysis of the credibility of each important witness was essential so that the Superior Court could

render a considered opinion. Also, in Newcomer v King, 447 A.2d 630 (1982), the Superior Court remanded the case to the lower court as a result of an inadequate record and opinion.

Equal protection under the law obviously requires (especially in a matter with the social importance of a custody dispute), that the standards promulgated for a complete and comprehensive lower court opinion in a custody case be applied to each and every such case. Where a lower court opinion lacks almost any comment as to the testimony of the witnesses of one of the parties, and the Superior Court of Pa. fails to remand the case to remedy the defect, appellant is deprived of his Constitutional rights in a situation with a dimension (the structure of the family) that strongly suggests that review by the U.S. Supreme Court is appropriate.

I. Is a party denied crucial Constitutional guarantees of due process and equal protection under the law when a trial court arbitrarily and without good cause halts a court proceeding in a custody case, without agreement of the parties, and delays resumption of

the case for 9 months? Does such a delay, with the associated distancing in time from a full relationship by the party not having temporary custody of his children, inherently prejudice the party without temporary custody?

Due process rights associated with the basic right to have a case heard by the court must include the right to have a case completed without unreasonable delay caused by the court. Otherwise, the underlying right to have a case decided by the court can lose much of its value. This is particularly true in a custody case.

A custody case generally involves a situation where an intact family has separated, and one parent (usually the father) has his continuing relationship with his children suddenly severed, except for some weekends and holidays. While in theory the resulting separation should not prejudice that parent legally, here it inevitably has significant legal as well as practical consequences.

The principle of the best interest of the child guides the court in custody cases in Pa., and a continuation of the status quo, assuming the children seem reasonably well

cared for, is inevitably seriously considered by the court. In practice, the continued separation can be very painful for the parent without custody, and it becomes increasingly difficult to resume the ties with the children as they existed prior to the separation. Children grow and change rapidly.

As a result, it is critical to the parent who is no longer living with his children on a daily basis to have his case decided by the court as soon as reasonably practical. Long delays resulting from the court's own motion are highly prejudicial to a litigant, and should be specifically prohibited unless clearly unavoidable. A delay imposed by the court for a parent to undergo therapy, where that parent has lived and cared for his children for a period of years with no evidence of lack of proper care of the children during the period the family was intact, is particularly grotesque. The U.S. Supreme Court should take note of the severe prejudice resulting from improper delays during the trial of a case, and hold that such delays must not occur if they are reasonably avoidable.

J. Where a trial court in its opinion in a

custody case strongly relies on a single expert, indicates its reliance by using exact language from the recommendation of that expert in framing judicial orders, and where the expert's recommendation depends on his diagnosis, must not the court also indicate in its opinion that it agrees with the diagnosis of the expert? Is reliance on the conclusion of an expert without an indication that the court accepts the diagnosis on which the recommendations of the expert are based a violation of the Constitutional due process and equal protection rights guaranteed to the party in question?

All too frequently a custody case is all but decided prior to the testimony of the witnesses by the conclusion of the expert witness or witnesses. Psychological "experts" are heavily relied upon by the courts in custody cases in spite of authoritative studies which have shown that the predictive value of psychological diagnosis is low. For example, in 29 Rutgers Law Review 1117 (1976), Psychology: Impediment or Aid in Child Custody Cases?, the author notes the "vagueness and elasticity of concepts of psychological disor-

ders," and that "psychological judgments involve a high degree of error." He states (p. 1143) ". . . In a number of rigorous well documented studies, the general invalidity of predictions of future behavior (by psychiatric diagnosis) has been established. . .," and concludes that "well intentioned behavioral science practitioners convinced of the accuracy of their unsystematic clinical observations can find in the over broad descriptions of childhood needs and harms support for virtually any opinion . . . The risk to child custody decision making would be reduced if more judges and lawyers were aware of the limitations of psychological theory, especially the dearth of confirmatory empirical data."

The case for or against reliance on psychological experts by courts in custody cases is unlikely to be quickly resolved. Nevertheless, doubts raised by studies regarding the reliability of psychological experts, as well as elementary logic, suggests that a court must after careful consideration accept or reject the diagnosis of such an expert before it reaches a decision on the value of that

expert's testimony. Otherwise the prejudice to a litigant resulting from an uncertain diagnosis is seriously compounded.

Where the court indicates in its opinion that it does not accept the diagnosis of the expert, by suggesting that alternative theories are possible in the eyes of the court, reliance by the court on the conclusion and recommendations of the expert is illogical, highly prejudicial, and an important reason to review the decision of the court.

K. When a trial court cites inadmissable hearsay evidence in the written opinion of the court, does not the implied importance of the inadmissable evidence to the court in reaching its decision indicate that significant violations of due process rights have occurred?

Psychological experts in their testimony before a court in a custody case are limited by evidentiary rules to the same degree as are layman witnesses. The proper application of the hearsay rule to a psychological expert in a custody case is particularly necessary because of the crucial importance the testimony of such an expert often assumes.

In certain situations an appellate court

may properly rule that the admission of improper evidence is not critical, but this must be improper in the extreme situation where a) the court refers to the improperly admitted evidence in its opinion, and b) the evidence is central to important issues in the case. Due process requires that the record of such a case be carefully examined.

Violations of evidentiary rules can be critical to the result of a case, and important policy reasons therefore exist to emphasize to lower courts the necessity of following evidentiary rules. An important principle of law exists in this situation suggesting that review of the issue by the U.S. Supreme Court is appropriate.

CONCLUSION

Rules of judicial conduct and trial procedure must not vary because of the nature of the case, or whether a party is represented by counsel or representing himself pro se.

Preventing the introduction of inadmissable evidence is an important function of the trial court. Ordering a party not to object to objectionable testimony seriously prejudices that party, thus violating his rights under

the U.S. Constitution.

Fathers must be granted equality in practice in child custody cases, as well as in theory. This is required under guarantees of due process and equal protection under the U.S. Constitution.

A lengthy delay in the middle of a much delayed custody case, for the purpose of requiring that party to undergo therapy not authorized by state law, prejudices the party without temporary custody and further deprives that party of rights guaranteed under the federal constitution. This is compounded when the party in question attends the psychological sessions, but does not participate to a degree that satisfies the trial court.

State law and constitutional guarantees require a comprehensive trial court opinion: proper appellate review is impossible without the benefit of such an opinion.

Petitioner was systematically deprived of rights guaranteed under the U.S. Constitution, both at the trial court and appellate level.

Respectfully submitted,

Mark Schwarcz

Mark Schwarcz, pro se

APPENDIX

IN THE COURT OF COMMON PLEAS
OF MONTGOMERY COUNTY, PENNSYLVANIA
CIVIL DIVISION

HARRIET B. SCHWARCZ	:	NO. 85-10922
V.	:	
MARK L. SCHWARCZ	:	CUSTODY

- -

MARK L. SCHWARCZ	:	NO. 85-10945
V.	:	
HARRIET B. SCHWARCZ	:	CUSTODY

OPINION

J. SMYTH NOVEMBER 16, 1987

This case involves the custodial rights of the parties over their two minor children. Harriet L. Schwarcz, mother, aged 36, is a medical doctor with a specialty in Family Medicine. She currently resides in a three bedroom house shared by her parents, who are available as babysitters. Mark B. Schwarcz, father, is currently an accounts manager, aged 39. Prior to February of 1987, father was an independent computer consultant with an erratic work history. Father currently

resides in a two bedroom apartment. The parties, formerly husband and wife, are the parents of two minor children, Myron and Sandra Schwarcz, aged eight and six years respectively.

On July 11, 1985, mother filed a Petition for Custody at docket No. 85-10922. That same day, father filed a Petition for Custody and Special Relief at docket No. 85-10945. On July 11, 1985, the Honorable Albert J. Subers entered an exparte order giving temporary physical custody of the parties' minor children to father during the weekdays and mother during the weekends. Said Temporary Order also granted joint, legal custody.

On July 12, 1987, as a result of a conference in Judge Suber's chambers by attorneys for both parties, the Temporary Order of July 11 was vacated and an Order was entered vesting temporary custody in mother, pending a conference before the custody conciliator scheduled for August 1, 1985. An agreement as to visitation was entered into on July 12 by counsel and the parties. Neither Judge Suber's Temporary Order of July 12, nor the

parties' agreement, allowed for overnight visitation with father.

On August 1, 1985, after an appearance before the custody conciliator and another conference with Judge Subers, it was directed that the terms of father's visitation rights remain as agreed to on July 12. In addition, father was granted one mid-week day dinner per week. Judge Subers also directed counsel to select two experts to perform comprehensive child custody evaluations. Later that day, counsel notified Judge Subers that they had selected a psychologist named Dr. Andrew R. Vogelson and a child psychiatrist named Dr. Marshall D. Schechter.

Upon request of father's counsel, mother and mother's counsel agreed to modify the existing agreement to permit father to come to mother's new home to pickup and deliver the children for visitation. As a result of a confrontation during a visitation delivery at mother's home, mother filed a Petition for Special Relief. On August 7, 1987, Judge Subers ordered that the initial pickup and delivery restrictions be reinstated.

On September 5, 1985, Dr. Vogelson issued his reports concerning mother and father. On September 17, 1985, Dr. Schechter issued his reports concerning the parties. and the parties' children. On October 23, 1985, testimony was taken before the undersigned from Dr. Schechter. Dr. Vogelson testified on January 6, 1986. Mother testified on January 7, 1986.

On February 26, 1986, a temporary Order was put on the record by the court. Said Order was memorialized in a written Order dated March 13, 1986. The temporary Order directed that the existing custody-visitation arrangement between the parties remain in effect, subject to several conditions. Among other things, the Order directed father to undergo psychotherapy with Dr. Michael Parrish, one of three therapists recommended to the court by father's attorney. Father's visitation schedule was to be amended to allow for overnight visitation in various degrees at certain time intervals subsequent to the first therapy session.

Father never underwent psychotherapy with

Dr. Parrish. As a result of father's refusal to undergo therapy with Dr. Parrish, a second Order dated June 6, 1986, was entered by the court. The second Order was identical to the initial Order of March 13, 1986, with the only change being a substitution of Dr. Michael Broden for Dr. Parrish. Subsequently, though father had not yet undergone any therapy as directed, mother, of her own volition, allowed father to have overnight visitation with the children. Father never pursued therapy and chose to proceed with the custody litigation.

On June 26, 1986, father's counsel. Lynne Gold-Bikin, Esq., filed a Petition to withdraw her Appearance. Said Petition was granted by Order of the Honorable S. Gerald Corso, dated August 7, 1986. On October 14, 1986, Neil Hurowitz, Esq., entered his appearance on behalf of father.

On December 11, 1986, father, acting on his own behalf, filed a Motion for Recusal of Trial Judge. On December 12, father's counsel, Neil Hurowitz, Esq., filed a Petition to withdraw his appearance. On January 5, 1987, a custody hearing was scheduled before the

undersigned at which time father appeared in court without an attorney. Father claimed he opposed Mr. Hurowitz' Petition to withdraw, therefore, the custody hearing was continued pending the outcome of Mr. Hurowitz' Petition and father's Motion for Recusal.

By Order dated January 21, 1987, the Honorable Richard S. Lowe granted Mr. Hurowitz' Petition. Father withdrew his Motion for Recusal in open court on February 2, 1987 and elected to represent himself in the custody litigation.

The custody hearing resumed on March 24, 1987, when several witnesses testified on behalf of mother, including a private investigator, Dr. Vogelson, two family friends, and mother's brother. Mother herself testified on March 25, 1987, as did mother's mother. On March 26, testimony was taken from the kindergarten director where the parties' children attended and mother's psychologist, Dr. Margaret Cooke, as well as father's witness, Dr. Hillel Raclaw, a clinical psychologist. On March 27, four personal friends of father testified on his behalf. On

March 30, additional testimony was taken from Dr. Schechter.

From April 6 through April 9, 1987, testimony was taken from mother, father and seven other witnesses. Those witnesses who testified on behalf of mother included mother's next door neighbor, a state police officer, and a personal friend of mother. Those witnesses who testified on behalf of father included father's sister, a previous employer of father, and two professors who taught at Drexel University where father attended. On April 9, the court had a private conference in chambers with the parties' children, after which the hearings in this matter concluded.

DISCUSSION

In a custody dispute, the guiding principle is to reach a decision which serves the "best interests" of the child, which interest includes the child's physical, intellectual, spiritual, and emotional well-being. Gonzalez v. Gonzalez, 337 Pa. Super. 1, 486 A.2d 449 (1984); Commonwealth ex rel. Newcomer v. Kine, 301 Pa. Super. 239, 447 A.2d

630 (1982). The parents, prior to the existence of a custody order, stand on equal footing and the only burden carried by either of them is to establish what is the best interests of the child. Agati v. Agati, 342 Pa. Super. 132, 492 A.2d 427 (1985): In re Custody of Hernandez, 249 Pa. Super. 274, 376 A.2d 648 (1977).

In the instant matter, it is father's inability to control his emotions, his attitude about the children's schooling, and the fact that he is a poor role model for his children, that compels the court, in the best interests of the children, to award physical custody of the parties' minor children to mother.

Several expert witnesses testified in this matter concerning the parties and the parties' minor children. A summary of their testimony is appropriate and helpful to the court.

On October 23, 1985, Dr. Schechter testified on direct examination that he evaluated each of the parties and the children, and read Dr. Vogelson's report. It

was his conclusion that mother and daughter, Sandra, were not suffering from any type of disorder. Dr. Schechter concluded that parties' son, Myron, suffered from an adjustment disorder with mixed emotional feelings containing primarily anxiety and depression. (N.T. 10/23/85 - 55). Dr. Schecter also concluded that father suffered from a paranoid personality disorder. (N.T. 10/23/85 - 55). He testified that one who suffers from a paranoid personality disorder has a tendency to strike out against those people who are causing the discomfort in the paranoid personality disorder. (N.T. 10/23/85 - 66).

It was Dr. Schechter's recommendation that primary physical, as well as full legal custody, remain in mother. He saw no problem with the then existing non-overnight visitation continuing as agreed. He recommended that father receive psychotherapy with the potential for overnight visitation to begin after a 4-6 month period. Dr. Schechter also recommended that mother receive counseling in order to help her to cope with the situation.

On January 6, 1986, Dr. Vogelson testified on direct examination that he evaluated both mother and father. It was his conclusion that mother had no psychological problems that would interfere with her parental function. (N.T. 1/6/86 - 83). Dr. Vogelson concluded that father suffered from a borderline personality disorder or possible antisocial personality disorder. He found that there was reason to seriously question father's capacity to parent independently at times. (N.T. 1/6/86 - 94). Based on his evaluation of father, Dr. Vogelson predicted that "there could be situations where he could become angry or simply not consider the implications of his behavior or his not taking action, which could put the children in danger." (N.T. 1/6/86 - 97). Dr. Vogelson, however, made no specific recommendations concerning custody or visitation rights.

On March 26, 1987, Dr. Raclaw, father's witness, a clinical psychologist, testified regarding two reports that he had written concerning father. The first report, a mental status examination dated July 15, 1986, con-

cerned an incident, to be discussed later, involving father's threatening use of a loaded gun. Dr. Raclaw determined that this incident occurred because father was upset due to the pending dissolution of his family. He determined that this incident "evidenced no mental illness of any significance." (N.T. 3/26/87-436).

Dr. Raclaw's second report, the result of a home visit with father and children, dated July 31, 1986, concerned father's interaction with the parties' children regarding possible custodial arrangements. Dr. Raclaw took issue with the opinions of the previous experts and determined that father had the capacity to parent his children and was capable of caring for them on a 24 hour basis. (N.T. 3/26/87-498).

Notwithstanding certain inconsistencies among the expert testimony, the record clearly demonstrates that father has great difficulty responding rationally to emotional stress. There are several instances of record where father has used inappropriate conduct in the context of the situation. One such instance,

as alluded to earlier, involved the threatening use of a loaded gun.

On May 20, 1985, mother and father gave a birthday party at their home for their son, Myron. Several children, relatives, and adult friends were in attendance. During the party, an incident occurred wherein father brandished a loaded pistol at workmen spreading fertilizer outside his home. In front of the guests, father challenged the workmen to call the police and subsequently threatened mother while she was on the phone with the police.

Father unloaded the gun before the police arrived and when confronted by the police he lied and tried to convince them that the gun in question was actually a toy gun. Eventually, after the party was dispersed by the police, father produced the real gun, but again lied and claimed it was unloaded during his confrontation with the workmen. It was while discussing this incident with Dr. Vogelson that father stated "I don't always understand why I do what I do." (N.T. 1/6/86 - 89).

Another instance of inappropriate conduct

occurred while father and mother's mother were having an argument about a teacher's strike. When father began to use profane and abusive language, mother's mother slapped father across the face. In response to this, father punched her in the eye with his fist, in which he was clenching keys. Her eye began to bleed and swell, requiring immediate hospital care and a visit to an opthomologist. This incident was testified to by mother (N.T. 1/7/86, 236-238) and mother's mother (N.T. 3/25/87, 236-237) and was corroborated by father's admission to Dr. Blum, a psychiatrist, during counseling. This admission contained in Dr. Blum's notes was read into the record by Dr. Raclaw, on cross examination. In another telling admission read by Dr. Raclaw from Dr. Blum's notes, father stated "I have conflict regarding control". (N.T. 3/26/87, 543).

Yet another incident must be mentioned. David Merrick, mother's next door neighbor and an eye witness, testified to the following incident. On August 4, 1985, father arrived at mother's residence to drop the parties' children off. Father started an argument with

mother in the children's presence. Father began using horribly profane and threatening language toward mother, as well as toward mother's father and uncle who were attempting to calm father down.

Father would not permit the children to enter the house until they removed the shirts off their backs, which he claimed to have purchased for them. At one point, father grabbed mother's uncle by the wrists. The police were called to the scene and father lied to them claiming that mother had started the incident. (N.T. 4/8/87, 114-123).

There was also an incident where father threatened to kill mother. Mother testified that father threatened to hire someone to kill her and he told her that because there would be no witnesses, he would get away with it because his guilt could not be proven beyond a reasonable doubt. This prompted mother to write a letter, dated October 8, 1984, to father's parents telling them of this threat, a copy of which she deposited in her bank vault. (N.T. 1/7/86, 246).

The above reported incidents clearly

demonstrate to the court that father is unable to control his emotions. This inability to control his emotions causes the court to seriously question father's ability to appropriately discipline his children. Additional instances of record help to demonstrate why the court raises this concern.

Dr. Schechter testified that Myron told him that father, when angry with the children, would pull Myron's hair and once hit him in the face. Myron also reported to Dr. Schechter that father hits Sandra and pulls her hair. (N.T. 10/23/85, 52). Mother testified that father, when disciplining the children, would lift them by the hair, "as if they were cats". (N.T. 1/7/86, 248). Mother testified that once when father was punishing Myron he grabbed him by the hair, put his head to the top of the bathroom toilet, and threatened to put Myron's face in the toilet. (N.T. 1/7/86, 249).

Mother also testified that if the children were being difficult at bedtime, father, over mother's objection, would put each child in his/her room, turn off the light so there

was total darkness, close the door and tie rope around the doorknobs so that the children could not get out. The children were left in their rooms screaming. Similarly, if the children were misbehaving father would put them in the bathroom with the lights off, in total darkness, and hold the door shut. (N.T. 1/7/86, 271).

In light of these practices, the court feels that father does not use appropriate methods when disciplining his children.

In addition, father serves as a poor role model for his children. There are several instances of record which demonstrate how father teaches the children, by example, to break and/or ignore the law. Father's driving habits, as testified to by several witnesses, involve frequent violations of the traffic laws, putting himself and his passengers, many times the children, in potentially serious danger. In light of this concern, the court recited a restriction on the record for father to "strictly obey all traffic laws and drive with extreme caution." (N.T. 1/6/86, 306).

Father, as evidenced by his official

driving transcripts in Pennsylvania and New Jersey, was in violation of both states licensing laws. Father maintained a New Jersey drivers license, though he didn't reside in New Jersey, and obtained Pennsylvania tags for his vehicle, but no Pennsylvania drivers license. Father admitted to this scheme, whereby he was committing two crimes. This is another example of how father intentionally ignores the law.

Father also lies in front of the children. For example, it was in the children's presence that father lied to the police regarding the "loaded gun incident".

These examples of father's behavior not only convince the court that father serves as a poor role model, but in addition raises questions concerning father's ability to properly guide the children in decision making.

In spite of father's behavior, the children seem to be doing well. They appear happy to be living with mother, who gives them constant love and care and actively participates in their development. Mother is a stable person with no behavioral problems that would

interfere with her child-rearing capacity. It is the childrens' teacher's impression, as well as the court's, that the children appear bright, well groomed, and attractive.

In light of the experts' testimony, all the recommendations of the experts, and the instances of record concerning father's behavior, the court finds that it is in the best interests of the children that primary physical custody be given to mother.

The court now turns to the question of shared "legal" custody. This involves the parents having joint input in all major decisions affecting the children, i.e. educational, medical, and religious matters. In Re Wedey J. K., 299 Pa. Super. 504, 445 A.2d 1243 (1982), sets forth the factors that a trial court must consider concerning the issue of shared custody, whether shared legal or shared physical custody. Those factors are as follows: Whether both parents are fit and desire continuing, active involvement with the child; whether the child sees both parents as sources of security and love; and whether the parents are able to communicate and cooperate with

each other to promote the child's best interests. Id.

In the instant matter, mother and father are in constant disagreement as to child-rearing decisions. They simply can not agree on anything. It is in the best interests of the children that they maintain certainty and continuity in their lives. The court feels that the only way to ensure continuity and stability is to grant mother sole legal custody. The Superior Court in Commonwealth ex rel. Jordan v. Jordan, 302 Pa. Super. 421, 448 A.2d 1113 (1982), recognized that stability is an important factor in children's emotional development. Granting shared legal custody in this matter would guarantee instability, fighting, and cast the court in the role of parent, all of which is contrary to the best interests of the children.

The main stumbling block that prevents mother and father from cooperating in child rearing decisions revolves around religion. Father wishes to take the children out of their Jewish conservative school, camp, and mixed cultural and athletic activities, where

they are doing well, and limit them to strict Jewish Orthodoxy, which father, himself, does not practice. Mother wants to integrate the children into society and to bring them into contact with mixed child oriented institutions, cultures, and religions. Father, on the other hand, seeks to limit their integration into society and would disrupt the childrens' lives to achieve this end.

The childrens' schooling is a major point of difference between mother and father. The children's present school is a private Jewish school which is conservative but has open enrollment for less religious (Reform) or highly religious (Orthodox) children.[1] Mother testified that the school "encourages education as far as different religions are concerned and different cultures are concerned." (N.T. 4/9/87, 112). . . Father is opposed to the school simply because it is not Orthodox. Father has a dislike of teachers and has feelings about schooling that are opposite to mothers'.

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[1]Mother alone pays for the children's tuitions at school, as well as camp and tutoring.

Schooling is just one of the many areas of major disagreement between mother and father concerning the children. There is disagreement regarding the childrens' participating in Reform services if invited by friends, as well as the children's attendance at Christmas parties of friends. There is disagreement concerning the children's participation in cultural and athletic activities at the local YMCA near mother's home and their enrollment in the Boy Scouts and Girl Scouts of America. There is also disagreement as to the children's enrollment and attendance at certain summer camps to which the children have become accustomed.

The disagreements seem to revolve around the children's involvement with a "mixed group" of children as opposed to only Orthodox Jewish children. There is even disagreement as to what food the children can eat. In fact, when mother was asked if there was anything that she and father agreed upon with respect to the parenting of these children, her answer was simply, "no". (N.T. 4/6/87, 143, 144).

Dr. Schechter strongly recommended that mother be given legal custody. He stated that he was confident that she could make decisions in the children's best interests, and noted that the children have been progressing well under her care. (N.T. 3/30/87, 14). Dr. Schecter was of the opinion that granting shared legal custody would make the children "subject to a constant series of differences of opinion and conflict, to a point where decisions might not be made in their favor and to meet their needs." (N.T. 3/30/87, 14)

Concerning father's fitness to parent, the court again notes that father is a poor role model who has trouble controlling his behavior. The court feels that father's behavior and attitudes would interfere with his ability to do what is in the children's best interests in their established schooling, religious upbringing, and social interaction. The court recognizes that father is an intelligent man who loves his children and wants to be part of their lives, however, it is father's inability to control his emotions, his poor role modeling, as well as the fact

that he and mother can not agree on anything concerning child-rearing, that compels this court to grant mother sole legal custody. Accordingly the Court enters the following Order.

FINAL ORDER

AND NOW, this 16th day of November 1987, after hearings in open court and upon consideration of briefs, the following is ORDERED and DECREED:

1. Harriet B. Schwarcz, mother, shall have legal and physical custody of the children, Myron and Sandra, who shall reside with her.

2. Mark L. Schwarcz, father, shall have partial custody (visitation) of the children as follows:

(1) Alternating weekends from 6:00 p.m. Friday until 7:00 p.m. on Sunday. Father shall pick up the children on Friday at the 7-11 store and mother shall pick up the children at father's residence on Sunday.

(2) Tuesday for mid-week dinner, from 4:30 p.m. to 7:45 p.m. Father shall pick the children up at and return the children to the

7-11 store. Mother shall give father 30 days advance notice of her intention to have the children on three non-consecutive Tuesdays during the year and to provide make-up time to father for three mid-week dinners.

(3) Father is to have children for fifteen (15) uninterrupted days during the summer when children are not in school. Father shall provide mother with forty-five (45) days advance written notice as to the time of said vacation period.

3. Father's partial custody (visitation) is subject to the following conditions:

(1) Father shall not remove the children from the Commonwealth of Pennsylvania, except when he visits his family in New Jersey, without written approval of Mother. Such approval shall not be unreasonably withheld. Father is restrained from taking the children to any other country or the State of Israel without approval of this court.

(2) Father shall not possess a gun on his person or elsewhere or have a gun in the house or motor vehicle.

(3) Father shall not operate a motor

vehicle with the children present without a valid Pennsylvania motor vehicle license.

(4) If father is in compliance with paragraph 4, when operating said motor vehicle with the children therein, father shall strictly obey all traffic laws.

(5) Each party shall allow and encourage the children to telephone the other parent and permit the children to speak to the other parent when he or she calls.

(6) Neither party shall enter upon the other's residence or place of employment.

(7) Should scheduled school functions, Hebrew School, sporting and extracurricular activities fall on father's partial custody/ visitation periods, father shall take the children to said events so they may attend the same.

(8) Should the children be invited to important family functions, such as, bar/bat mitzvahs, weddings, and funerals' at a time when either parent has the children, that parent shall make special arrangements on the children's behalf to enable them to attend.

(9) Each parent shall be responsible for

maintaining and supplying their own bedding, linens, and pillows for the children.

(10) If the children have fever or infection, father shall follow the physician's instructions regarding care and medication during his partial custody/visitation time.

(11) Each parent shall notify the other of any change of home addresses and supply their work telephone numbers to each relative to issues involving the children.

4. There shall be strict compliance with the conditions set forth in 3 above.

5. Mother shall direct the children's schools, synagogues, and camps to forward copies of all records and reports to father.

6. The following holiday schedule is ordered:

(1) Rosh Hashannah is a two day Jewish holiday. If the holiday falls on mother's time, father will have the second day from 9:00 a.m. to 7:00 p.m. If the holiday falls on father's time, mother shall have the second day at 9:00 a.m. to 7:00 p.m.

(2) For Passover, there are two Seder nights. If the first Seder night occurs on

Monday through Friday, mother shall the children the first night and father shall have the children from 10:00 a.m. until 10:00 p.m. on the day of the second Seder. If the first Seder night occurs on Saturday, mother shall have the children Saturday and father shall have the children Sunday from 10:00 a.m. to 10:00 p.m. If the first Seder night occurs on Sunday, the parent who has the children that weekend shall have the children the first Seder night and the other parent shall have the children from 10:00 a.m. until 10:00 p.m. on the next day.

(3) The children will be with mother on Mother's Day from 10:00 a.m. to 7:00 p.m. and father shall have the children on Father's Day from 10:00 a.m. to 7:00 p.m.

BY THE COURT:

/s/ Joseph A. Smyth

cc: Emanuel A. Bertin, Esq.
Mark L. Schwarcz

HARRIET SCHWARCZ, : IN THE SUPERIOR COURT

Appellee : OF PENNSYLVANIA

v. :

MARK LEO SCHWARCZ, :

Appellant : No. 383 Philadelphia 1988

Appeal from order entered November 16, 1987, in the Court of Common Pleas of Montgomery County, Civil, No. 85-10922.

MARK L. SCHWARCZ, : IN THE SUPERIOR COURT

Appellant : OF PENNSYLVANIA

v. :

HARRIET B. SCHWARCZ, :

Appellee : No. 384 Philadelphia 1988

Appeal from order entered November 16, 1987, in the Court of Common Pleas of Montgomery County, Civil, No. 85-10945.

J U D G M E N T

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Montgomery County be, and the same is hereby AFFIRMED.

By the Court:

/s/ David A. Szawczak
Prothonotary

Dated: September 26, 1988

HARRIET SCHWARCZ, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
MARK LEO SCHWARCZ, Appellant	:	No. 383 Philadelphia 1988

Appeal from order entered November 16, 1987, in the Court of Common Pleas of Montgomery County, Civil, No. 85-10922.

MARK L. SCHWARCZ, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
HARRIET B. SCHWARCZ, Appellee	:	No. 384 Philadelphia 1988

Appeal from order entered November 16, 1987, in the Court of Common Pleas of Montgomery County, Civil, No. 85-10945.

BEFORE: McEWEN, OLSZEWSKI, and CERCONE, JJ.

OPINION BY OLSZEWSKI, J.: FILED SEP 26 1988

This appeal is from a trial court order granting primary physical and legal custody to appellee and granting partial custody with specified limitations to appellant. In this custody dispute, nine issues are presented for our review:

(1) Did the trial court err by allowing hearsay into evidence over objections by appellant?

(2) Did the trial court properly consider the option of joint custody?

(3) Did the trial court adequately discuss the evidence?

(4) Did a conflict of interest exist when appellee's counsel allegedly refused to withdraw as counsel for appellee after he joined a law firm allegedly retained by appellant, and, if a conflict does exist, does it constitute reversible error?

(5) Did the trial court have authority pursuant to Section 1006 of the Custody and Grandparents Visitation Act ("Custody Act")[1] to require appellant to undergo psychotherapy?

(6) Did the trial court abuse its discretion in limiting rebuttal evidence by appellee regarding whether appellant was the primary caretaker of the children and thereby indicated its disinterest in the primary caretaker doctrine?

(7) Did the trial court abuse its discretion in failing to admonish expert witnesses who allegedly became argumentative or sarcastic when cross-examined by appellant?

(8) Did the trial court unreasonably limit appellant's visitation rights?

(9) Does the record reflect continued and significant prejudice on the part of the trial judge towards appellant, resulting in reversible error?

For the reasons below, we affirm the trial court order.

Appellant, Mark L. Schwarcz, and appellee, Harriet B. Schwarcz, were married on August 7, 1977, and separated on or about July 6, 1985. They are the parents of two minor children, Myron and Sandra.[2] On July 11, 1985, appellee[3] filed a petition to confirm custody. That same day, appellant[4] filed a petition for custody and special relief pursuant to Pa.R.C.P. 1915.13. On July 12, 1985, the Honorable Albert J. Subers entered a temporary order granting custody to appellee pending a custody conciliation conference scheduled for August 1, 1985.[5] Counsel and the parties also agreed to a visitation schedule and certain conditions. These conditions included that appellee transport the children to and from appellant's residence for visitation.

On August 4, 1985, after an appearance before the custody conciliator and a court conference, Judge Subers directed that the current custodial arrangement with an additional mid-weekday dinner visit per week continue. Judge Subers also directed the par-

ties' counsel to select two experts. The mutually selected experts were Andrew R. Vogelson, Ph.D., and Marshall D. Schechter, M.D.

On August 5, 1985, appellee filed a petition for special relief under Pa.R.C.P. 1915.13, requesting that the trial court enter an order prohibiting appellant from entering the premises where appellee resides.[6] The petition alleged that a confrontation had occurred during a visitation delivery at appellee's home.[7] On August 7, 1985, Judge Subers granted appellee's relief, and also ordered that appellee be prohibited from entering appellant's premises.

After submission of the written evaluation reports and recommendations by Dr. Schechter and Dr. Vogelson, respectively, and after extensive direct and cross-examination of each expert by the parties, the trial court issued a temporary order dated March 13, 1986, directing that the existing custodial arrangement remain in effect subject to specific conditions. Appellant was ordered to undergo psychotherapy for the purpose of advising the

trial court whether overnight visitation is appropriate. The order further included a schedule whereby overnight visitation and its extension was dependent upon completion of psychotherapy sessions by appellant.[8] Dr. Schechter diagnosed appellant as suffering from a paranoid personality disorder[9], and expressed concern regarding appellant's stability. He strongly recommended that primary custody be vested in appellee, and advised against granting overnight visitation to appellant during a reevaluation period. During this reevaluation period, Dr. Schechter recommended that appellant undergo psychotherapy.

On December 11, 1986, appellant filed a pro se motion for recusal of the Honorable Joseph A. Smyth. On March 24, 1987 custody hearings continued and, in open court, appellant confirmed that he had sent a letter to Judge Smyth withdrawing his motion for recusal. On November 16, 1987, the trial court issued its order, awarding custody to appellee and partial custody to appellant with specified conditions. By trial court order of December 7, 1987, the above-captioned cases

were consolidated for purposes of appeal. This timely appeal followed.

Our paramount concern in custody matters is the best interest of the child, including the child's physical, intellectual, emotional and spiritual well-being. Brooks v. Brooks, 319 Pa.Super. 268, 466 A.2d 152 (1983). In these matters, our scope of review is broad. Burke v. Pope, 366 Pa. Super. 488, ____, 531 A.2d 782, 784 (1987); however, ". . . this broader power of review was never intended to nullify the fact-finding function of the hearing judge. It is a principle which runs through all our cases that the credibility of witnesses and the weight to be given to their testimony by reason of their character, intelligence, and the knowledge of the subject can best be determined by the judge before whom they appear." Lombardo v. Lombardo, 515 Pa. 139, ___, 527 A.2d 525, 529 (1987) (citations omitted). We, therefore, are "empowered to determine whether the trial court's incontrovertible factual findings support the trial court's factual conclusions, but may not interfere with those conclusions unless they are

unreasonable in light of the trial court's factual findings. . . . ; and thus, represent a gross abuse of discretion. . . . (Emphasis in original)." Id. at ___, 527 A.2d at 529, quoting Robinson v. Robinson, 505 Pa. at 237, 478 A.2d at 806 (citations omitted).

Having set forth our scope of review, we turn to appellant's first contention. Appellant asserts that the trial court committed error in permitting hearsay to be admitted into evidence over objections. Appellant identifies a number of statements for our review. Initially, we note that, contrary to appellant's contentions, certain statements were introduced without objection. We, therefore, hold that arguments pertaining to those statements are waived.[10] For example, appellant contends that the updated evaluation report by Dr. Marvin Schechter "was based in part on hearsay statements allegedly made by the parties' children, and related to the psychiatrist by the mother." Appellant's brief at 11. Appellant specifically points to a statement in Dr. Schechter's written evaluation that "Myron reports also that his

father uses 'tickle torture' to the point where Myron then throws up." Plaintiff's exhibit dated December 29, 1986, at 2. We note that, contrary to appellant's contention, the record is devoid of any objection to the introduction of the report into evidence as hearsay. We, therefore, find the hearsay objection waived in regard to the report and its contents. See Ellingsen v. Magsamen, 337 Pa.Super. 14, 486 A.2d 456 (1984). Likewise, we find that appellant's hearsay claim in regard to Dr. Schechter's in-court testimony pertaining to the same statement is waived. No objection was made when Dr. Schechter testified. Furthermore, appellant did not object when appellee testified that the children tell her" '[i]f we want to wake Daddy up, all we have to do is tell him that we're going to call Mommy and that will get him out of bed, fast. '" N.T. April 6, 1987, at 138. Thus, any hearsay argument is waived in regard to this testimony.

Appellant also contends that the trial court erred in admitting "reports prepared by teachers of the children." Appellant's brief

at 12. Appellant objected to four exhibits allegedly prepared by the children's teachers and offered by appellee. Appellant's objections to two of the exhibits were sustained. The trial court, however, admitted the other two exhibits, finding that the exhibits were prepared pursuant to one's function as a school teacher. School records may qualify as business records. See Phillippi v. School District of Springfield Township, 28 Pa. Cmwlth. 185, 367 A.2d 1133 (1977).[11] Pursuant to 42 Pa.C.S.A. §6104, official records are defined as "a copy of a record of governmental action or inaction." The report cards of a private school do not constitute such a record. Pursuant to the Uniform Business Records As Evidence Act,[12]

> A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information, method and time of preparation were such as to justify its admission.

42 Pa.C.S.A. §6108(b).

Instantly, the record discloses that no testimony by a "custodian or other qualified witness" was presented by the party offering the exhibits. Rather, the trial court admitted the exhibits upon its own examination of the exhibits without any foundation, stating:

> This is a status report as to how they are doing in school, P-26. And it is signed. It is not just typewritten. And it is signed by three people. It purports to be the signature of three teachers at school, and there are three different signatures. I don't think anyone forged them. I think that is a school record. And I think that P-25 is a school record. And I will admit that.

N.T. April 6, 1987 at 167.

> P-28 is admissible. That's a report of Sandra Schwarcz, for the same reason the report of Myron is admissible.

N.T. April 6, 1987 at 168.

We find that the trial court followed inappropriate procedures in admitting the updated school records into evidence over the objection of appellant. We, however, find that the conclusion reached by the trial court is supportable even without resort to the two updated school records and, therefore, we will not reverse on these grounds. Moorman v.

Tingle, 320 Pa.Super. 348, ___, 467 A.2d 359, 363 (1983).

Appellant also points to specific testimony by appellee during direct examination whereby appellee relates what each child told her regarding: (1) what appellant stated to each child and (2) what took place between each child and appellant. We find the trial court did not err in admitting appellee's testimony "for the purpose of establishing what was in the minds of the children, and the impact upon the children of [appellant's] conduct. . . . " In re Rinker, 180 Pa.Super. 143, ___, 117 A.2d 780, 786 (1955). We note, however, that the trial court relied on the following testimony for the truth of the matter asserted.[13]

> Myron came crying to me once that Daddy took him--not taking him nicely out of the bathtub and accidentally having him slip with his body into the toilet, but Mark was on the telephone, and Myron had interfered, and so Mark took him by his hair into the bathroom, put his head to the top of the toilet seat and said to him, 'If you don't listen to me, I will put your face in the toilet.' His head actually touched the toilet seat.

N.T. January 7, 1986 at 248-249. Appellee further testified:

And in fact, I discussed it with Mark. We had a big discussion about that, because as far as I am concerned, you don't do that to any human being.

BY [APPELLEE'S COUNSEL]:

Q. And what did Mark say?

A. He justified what he did. He felt he was right, Myron had interfered with what he was doing, and he had no right to do that.

Q. He didn't deny what he did?

A. No. He admitted that he did it.

N.T. January 7, 1986 at 249-250.

Appellant was not prejudiced by the trial court's reliance on Myron's statements as related by appellee. In addition to testifying to what Myron said, appellee testified that she discussed the episode with appellant. During this discussion, appellant justified and admitted that he disciplined Myron in the manner described by appellee. This additional testimony provides competent evidence of appellant's admissions[14] and, thus, corroborates any hearsay testimony.

Appellant also claims that the trial court erred in admitting the following testimony by appellee:

Q. What has Mr. Schwarcz told you he intends to do with the children should he get custody or have a right to decision making?

A. He not only told me, but something that really frightened the principal and teachers of the school, he said that the moment he gets custody of the children, he will pull them out of the school. And they brought this to my attention.

N.T. April 6, 1987 at 111. (Emphasis added.)

We find that appellant was not prejudiced by the above testimony. Appellee testified that appellant informed her of these same intentions. The record further bears this out when appellee stated:

Q. When was the last time you had discussion with Mr. Schwarcz about what you just testified to?

A. After the reports came out, because in spite of the fact that--not after the last--not after P-29, but after P-28--because I was very concerned, because the children came crying to me that Daddy wants to take us out of Solomon Schechter, he wants to put us in a different school, he wants to puts us in Beth Jacob--

N.T. April 6, 1987 at 111. (Emphasis added.)

Appellant further claims that the trial court erred in allowing appellee to testify regarding recommendations by teachers as related to appellee by Margaret Cooke. Instant-

ly, we find the trial court properly permitted the testimony for the limited purpose of knowing what appellee did in response to the recommendations.[15] Without knowing what the recommendations were, the trial court cannot properly assess appellee's response. We, therefore, find no error.

Second, appellant asserts that the trial court did not properly consider the option of joint custody. We disagree. Pursuant to the Custody Act,[16] a trial court has broad discretion in awarding shared custody. See section 1005 of the Custody Act; Agati v. Agati, 342 Pa.Super. 132, 492 A.2d 427 (1985). In In re Wesley J.K., 299 Pa.Super. 504, 445 A.2d 1243 (1982), this Court set forth the following guidelines in determining when an award of shared custody is appropriate:

> (1) "[B]oth parents must be 'fit.' Both parents must be sane and capable of making rational child-rearing decisions. Both must be willing and able to provide love and care for their children.";
>
> (2) There must be "a desire on the part of both parents for a continuing active involvement in their child's life.";
>
> (3) "[T]he child has formed a relationship with both parties."; and

(4) "There is a minimal degree of cooperation between the natural parents."

Id. at ___, 445 A.2d at 1248-1249.

Appellant specifically argues that the trial court erred in its determination of appellant's fitness and in its determination of the degree of cooperation between appellant and appellee.[17] In the instant matter, the trial court held that "it is [appellant's] inability to control his emotions, his attitude about the children's schooling, and the fact that he is a poor role model for his children, that compels the court, in the best interests of the children, to award physical custody of the parties' minor children to [appellee]." Trial court opinion at 8. It reiterated these same factual conclusions to support its award of sole legal custody,[18] and further stated:

> [M]other and father are in constant disagreement as to child-rearing decisions. They simply can not agree on anything. It is in the best interests of the children that they maintain certainty and continuity in their lives. The court feels that the only way to ensure continuity and stability is to grant mother sole legal custody.

Trial court opinion at 19.

In examining the record before us, we find that there is sufficient, competent evidence to support the trial court's conclusion that appellant is not "fit." The trial court refers to a number of examples from the record indicating that father's personality directly bears on his ability to parent. One such example is the gun incident that took place at Myron's birthday party in the presence of the children, family and friends. The trial court writes:

> On May 20, 1985, mother and father gave, a birthday party at their home for their son, Myron. Several children, relatives, and adult friends were in attendance. During the party, an incident occurred wherein father brandished a loaded pistol at workmen spreading fertilizer outside his home. In front of the guests, father challenged the workmen to call the police and subsequently threatened mother while she was on the phone with the police.
>
> Father unloaded the gun before the police arrived and when confronted by the police he lied and tried to convince them that the gun in question was actually a toy gun. Eventually, after the party was dispersed by the police, father produced the real gun, but again lied and claimed it was unloaded during his confrontation with the workmen. It was while discussing this incident with Dr. Vogelson that father stated, "I don't always understand why I do what I do." (N.T. 1/6/86 - 89).

Trial court opinion at 12.

In addition, the trial court refers to two specific confrontations: (1) one alleged in appellee's petition for special relief,[19] and testified to by an eyewitness; and (2) another between appellant and appellee's mother. The confrontation between appellant and appellee's mother involved an argument during which appellant punched appellee's mother in the eye in response to appellee's mother slapping appellant for using profane and abusive language. As a result of appellant's actions, appellee's mother was required to undergo immediate medical care and a subsequent visit to an ophthalmologist. In addition to these examples, the trial court relied upon Dr. Vogelson's expert testimony in its analysis:[20]

> . . . [Dr. Vogelson] found that there was reason to seriously question father's capacity to parent independently at times. (N.T. 1/6/86 - 94). Based on his evaluation of father, Dr. Vogelson predicted that "there could be situations where he could become angry or simply not consider the implications of his behavior or his not taking action, which could put the children in danger." (N.T. 1/6/86 - 97) . . . .

Trial court opinion at 10. We further note

that the trial court refers to matters of record indicating that appellant serves as a poor role model for the children. These include appellant's driving habits, placing appellant and, many times, the children in danger; violation of automobile licensing laws; and lying in the presence of the children. Relying on these matters, the trial court also expressed concern regarding "[appellant's] ability to properly guide the children in decision making." Trial court opinion at 17.

There is also sufficient, competent evidence to support the trial court's conclusion that [appellant] and [appellee] are in constant disagreement as to child rearing decisions." Trial court opinion at 19. Disagreements pertain to what school the children should attend, whether the children should be involved in Scouting activities, and whether the children should be permitted to enroll in activities at a Christian YMCA. Generally, the record reflects discord in regard to the children's religious upbringing and social interaction. Appellee testified:

> . . . I feel that the children, even at this stage, have a very strong identity through everything that they have done, not only at school, but at home and other activities. And I feel that even the school encourages education as far as different religions are concerned and different cultures are concerned. And I feel that even at this stage, this is the age that you prevent a child from growing up to be prejudiced, not the other way around.

N.T. April 9, 1987, at 112.

Appellant, however, admitted objecting to appellee's enrollment of Myron in the Boy Scouts because he wanted Myron "to be involved in more Jewish activities." N.T. April 9, 1987, at 92.[21] Appellant also explained his opposition to appellee's enrollment in the Christian YMCA:

> Q. And the YMCA situation, which she was enrolling them, you objected to that, as well, isn't that right, on the lines that it was non-Jewish, not exclusively Jewish.
>
> A. I objected to their becoming members of the YMCA. They were at a very young age. And there's a lot of symbolism there of the various Christian holidays. And at that tender age, since they're already exposed to a lot of Christian symbolism and customs just living in this country, and T.V. and in stores and in such, that I thought that at a young age, they should go to a Jewish Y.
>
> BY THE COURT:

Q. At what age do you think they should be allowed to go to a Y where they are exposed to some of these things that you are exposed to in this country? I mean you act like you are against it at a young age, but you are not against it at an older age.

A. That is correct.

Q. Where does that start?

A. I am not sure. I would think it would be a gradual thing, not a fixed line or point.

As I think I have stated earlier to the Court, I feel that the impressions on a child when he is young are the ones that are the most important in his development and formation and his religious feeling. And I am very concerned about that.

N.T. April 9, 1987 at 92-93. Furthermore, Dr. Schechter testified:

Q. How important in your opinion is it that she have the legal custody, as opposed to there being shared legal custody?

A. I can see no way in which these two people can agree on any particular matters. The importance is not only in that regard to which the children will be subject to constant series of differences of opinion and conflict, to a point where decisions might not be made in their favor and to meet their needs.

But also that I think that the children under the circumstances that they're currently existing are progressing well.

N.T. March 30, 1987, at 14. The record clear-

ly demonstrates the parties' incapability to cooperate on matters of importance to the children.

We further find appellant's reliance on Brown v. Eastburn, 351 Pa. Super. 479, 506 A.2d 449 (1986), and Murphey v. Hatala, 350 Pa.Super. 433, 504 A.2d 917 (1986), alloc. dn. in ___, Pa.___, 533 A.2d 93 (1987), is misplaced. In Brown, this Court found that the record demonstrated a minimal level of parental cooperation to support an award of shared custody. We recognized the following factors as indicative of this cooperation: (1) the parties had stipulated to a shared custody arrangement; (2) the parties had engaged in a significant amount of negotiating and compromising in the implementation of a prior custody arrangement; and (3) mutually selected experts recommended an award of shared custody.

Instantly, we note that the mutually selected expert, Dr. Schechter, did not recommend an award of shared custody.[22] In addition, although the parties in this case initially agreed to a visitation schedule, with

specified conditions, problems quickly arose after appellee agreed to modify the existing arrangement and allow appellant to pick up and deliver the children at her residence. As a result, court intervention was required in the form of an order prohibiting appellant and appellee from entering each other's premises. Thus, we find Brown distinguishable.

In Murphey, this Court found that the trial court's factual findings, including the finding that "the parties ha[d] insurmountable problems in their relationship which would render a shared custody scheme unworkable . . .," were not supported by the record. We stated:

> We acknowledge the testimony in the record as to the discord between the parties and as to their day to day problems and inconveniences. There is also extensive testimony, however, from all three expert witnesses, and the parties themselves, stating that the majority of these problems stem from the friction caused by the frequency of [the child's] exchange between the parties. All the experts testified that these problems could be overcome with a custody plan affording [the child] larger blocks of time with each parent, thereby lessening the contact time between the parents and consequently reducing their conflicts.

Id. at ___, 504 A.2d at 921 (citations

omitted, emphasis in original). Thus, in Murphey, the focus was not on whether a shared custody arrangement was appropriate, but what type of shared custody scheme would work. This is not the issue before us. We, therefore, find Murphey distinguishable.

Third, appellant asserts that the trial court did not adequately discuss the evidence. Specifically, appellant alleges that the trial court failed to mention any of the evidence presented by appellant[23] and any of the arguments raised in appellant's trial brief.[24] In reviewing a trial court's custody determination, we require that the trial court:

> . . . provide us with a complete record and a comprehensive opinion which contains a thorough analysis of the record and specific reasons for its ultimate decision. Cady v. Weber, 317 Pa.Super. 481, 464 A.2d 423 (1983); Pa.R.C.P. No. 1915.10 -- Explanatory Note -- 1981. The appellate courts require an opinion which demonstrates that the trial judge in a custody case has analyzed the record as a whole and has dealt with significant factual disputes in a manner which will enable the appellate courts to understand the reasons for the decision and to make an intelligent evaluation of the opinion and of the testimony; the judge need not discuss the testimony of each witness or make citations to the transcript. Sandra

L.H. v. Joseph M.H., 298 Pa.Super. 409, 44 A.2d 1241 (1982). The lower court's opinion need not discuss all the evidence presented or state why some evidence is regarded as more persuasive.

Heddings v. Steele, 344 Pa.Super. 399, 496 A.2d 1166 (1985), aff'd., 514 Pa. 569, 526 A.2d 349 (1987). We find that the trial court sufficiently discussed the factors it found significant and relevant in reaching its ultimate decision.

Appellant relies on this Court's decision in Kimmey v. Kimmey, 269 Pa.Super. 346, 409 A.2d 1178 (1979), to support his contention that "the trial court must provide a complete and comprehensive opinion with detailed analysis of the evidence if it is to avoid error." Appellant's brief at 17-18. In Kimmey, father appealed from a trial court order awarding custody to mother. During the custody proceedings, witnesses, on behalf of father, testified that the parties' children were not properly fed, cleaned, or supervised under mother's care. In spite of this testimony, the trial court opinion discussed an argument that occurred between the parties, father's attempt to negotiate custody by requesting

that mother relinquish certain property rights, and father's threat to take the children to Canada or Australia. This Court found that the trial court failed to file a comprehensive opinion. Instantly, Kimmey is distinguishable. In Kimmey, important testimony that provided evidence of a party's conduct having a harmful effect on the children was not mentioned in the trial court's opinion. In this case, the trial court sufficiently stated its reasons for its decision, relying on relevant, important evidence that directly bears on the issue of the best interest of the child.[25]

Appellant's reliance on Commonwealth ex rel. Newcomer v. King, 301 Pa.Super. 239, 447 A.2d 630 (1982), is also misplaced. In Newcomer, the trial court awarded custody to father, finding that "both parents were capable of providing for the child, but that custody should remain with [father] because of the stable relationship between father and son. . . . " Id. at ___, 447 A.2d at 633-634. Father had absconded with one of the children to California prior to a hearing date and was

held in contempt for failing to appear before the court. Upon return to Pennsylvania, father was arrested. This Court held that the trial court's opinion was deficient for a number of reasons. These reasons included the trial court's: (1) failure to provide a comprehensive analysis of father's actions and, thus, implying a possible misunderstanding of the law;[26] (2) inclusion of factual findings that, without sufficient explanation, were unsubstantiated by the record; (3) failure to make reference to a report that was ordered by the trial court and had delayed the court's determination until results were known; (4) failure to include a discussion of the policy that absent compelling reasons, siblings should remain in the same household; and (5) failure to assess the credibility of witnesses in light of conflicting testimony.

In the instant case, the trial court provided a comprehensive analysis, applying the best interest of the child standard and properly reviewing the option of shared custody. Appellant asserts that the trial court did not discuss the application of the primary care

doctrine. As we previously stated, we find that the trial court's findings support the conclusion that father is not "fit" and, therefore, the primary care doctrine would not come into consideration. We do not require the trial court to discuss the nonapplicability of every doctrine or policy in child custody matters. We also note that, unlike Newcomer, the trial court properly considered recommendations of experts who were mutually selected by the parties at the request of the trial court. Furthermore, we find that it is unnecessary to remand this case for an assessment of the credibility of witnesses. The trial court, when relying on conflicting expert testimony, explained the basis for its reliance. Moreover, the trial court supports its decision with evidence that is many times uncontradicted or corroborated.

Fourth, appellant contends that a conflict of interest existed when appellee's counsel refused to withdraw as her counsel after joining a law firm which appellant had retained[27] and, thus, reversible error exists. On March 24, 1987, prior to the commencement of

the continued custody hearings, appellee's counsel presented to the trial court and appellee that he was currently negotiating with the law firm, Abrahams and Loewenstein, for a position as partner with the firm. He further disclosed to the trial court and appellee that, during negotiations, it was brought to his attention that appellant had consulted with Saul Levit, Esquire, a partner of Abrahams and Loewenstein, in regard to this custody dispute.[28] The trial court questioned appellee's counsel as follows:

> THE COURT: So my understanding is in the process of your negotiations with this firm you've learned that [appellant] has consulted with Saul Levit. However, you're not privy to any of the communications between [appellant] and Mr. Levit. Is that correct?
>
> [APPELLEE'S COUNSEL]: That's correct. And I also learned today that the meeting took place sometime in the summer of 1986.
>
> [APPELLANT]: That's correct.
>
> THE COURT: So we put that on the record. Fine. Let's go to court. There's nothing else to say. It has been placed on the record.

N.T. March 24, 1987, at 4.

We find that appellant was not prejudiced by appellee's counsel's negotiations. The record indicates that appellee's counsel was not privy to any information Mr. Levit may have acquired as a result of appellant's consultation. We, therefore, hold that no reversible error occurred.

Fifth, appellant contends that the trial court has no authority under Section 1006 of the Custody Act to require appellant to undergo psychotherapy.[29] Specifically, appellant contends that Section 1006 limits the trial court to order a parent to undergo "counseling" which is distinct from "psychotherapy." Appellant asserts, 11[c]ounseling suggests a conversational give and take as well as the receiving of advice" whereas "[p]sychotherapy indicates in depth treatment for a psychological problem." Appellant's brief at 40.

In interpreting the Custody Act, we are guided by the principles of the Statutory Construction Act.[30] We must "ascertain and effectuate the intention of the General Assembly," and construe every statute, "if possible, to give effect to all its provisions."

1 Pa.C.S.A. §1921(a). "When the words of a statute are clear and free from all ambiguity, the letter of it is to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S.A. §1921(b). "When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering [a number of factors]."[31] 1 Pa.C.S.A. §1921(c).

With these principles in mind, we turn to Section 1006 of the Custody Act. Section 1006 reads in pertinent part:

> (a) The court may require the parents to attend counseling sessions and may consider the recommendations of the counselors prior to awarding sole or shared custody. These counseling sessions <u>may include but shall not be limited to</u> discussions of the responsibilities and decision making arrangements involved in both sole and shared custody, and the suitability of each arrangement to each or both parent's capabilities.
>
> (b) The court may temporarily award custody to either parent or both parents, pending resolution of any counseling.

40 P.S. §1006(a) and (b) (emphasis added).

We are to construe words according to their common usage, 1 Pa.C.S.A. §1903; however, we cannot ignore the definition or

explicit language contained in the statute. 1 Pa.C.S.A. §1921(b). By its explicit language in Section 1006(a), the legislature does not limit its definition of counseling sessions. Rather, it provides an expansive definition and, thus, enables the trial court to exercise its discretion in framing an order. In exercising its discretion, the trial court, of course, must be mindful of the stated legislative purpose of the Custody Act. The legislature states "that it is the public policy of this Commonwealth, when in the best interest of the child or children, to assure a reasonable and continuing contact of such child or children with both parents after a separation or dissolution of marriage, and the sharing of the rights and responsibilities of child rearing by both parents." 40 P.S. §1002. The trial court, therefore, has authority to require psychotherapy of a parent if the psychotherapy "assure[s] a reasonable and continuing contact of such child or children with both parents after a separation or dissolution of marriage." Id. In the instant case, the trial court issued a temporary order stating in

pertinent part:

> [Appellant] is directed to contact Michael Parrish, Ph.D., . . . for the purpose of establishing an arrangement whereby [appellant] undergoes psychotherapy at the direction of Dr. Parrish. The cost of such therapy (sic) is to be paid by [appellant]. The purpose of such therapy (sic) is to advise the undersigned as to whether overnight visitation with children and [appellant] is appropriate at this time.

Trial court temporary order dated March 13, 1986.

We find that the trial court did not abuse its discretion in issuing a temporary order requiring appellant to undergo psychotherapy for the "purpose of advising the trial court as to whether overnight visitation with Children and [appellant] is appropriate . . . ." The stated purpose of the trial court order is consistent with the stated policy of the legislature to encourage contact with the children. In addition, we note that the trial court's order is consistent with Dr. Schechter's recommendation.

Sixth, appellant contends that the trial court indicated its disinterest in the primary caretaker doctrine by limiting rebuttal evidence by appellee regarding whether appellant

was the primary caretaker of the children. Specifically, appellant points to the following statement by the trial court as an indication of its disinterest in the primary caretaker doctrine:

> There is a disagreement over percentages. And there, you get back into perceptions. And I am sure that any spouse in any marriage honestly believes they do more than they do . . . and I don't think you have to spend a whole lot of time disputing what was done in the past.

Appellant's brief at 43, quoting transcript dated April 9, 1987, at 107.[32]

We find no merit in this contention. In Commonwealth ex rel. Jordan v. Jordan, ___ Pa.Super. ___, 448 A.2d 1113 (1982). This Court held "that where two natural parents are both fit, and the child is of tender years, the trial court must give positive consideration to the parent who has been the primary caretaker." Id. at ___, 448 A.2d at 1115. (Footnote omitted.) In addition, we recognize that the trial court must provide us with a complete record in child custody disputes.

K.L.H. v. G.D.H., 318 Pa.Super. 330, 464 A.2d 1368 (1983). Perusal of the record reveals that the trial court allowed appellant to testify regarding his role as the primary caretaker. We disagree that the trial court's statement indicates a disregard of the proper application of the primary care doctrine. Rather, the trial court properly exercised its discretion in limiting rebuttal evidence. See Neal by Neal v. Lu, 365 Pa.Super. 464, 530 A.2d 103 (1987) (Admission or rejection of rebuttal evidence is within the discretion of the court.).

Appellant's seventh contention is also without merit. Appellant argues that "[o]n numerous occasions, Dr. Schechter and Dr. Vogelson became argumentative or sarcastic when cross-examined by father, "and the trial Court did little to admonish the witnesses to answer father's questions." Appellant's brief at 43. Our review of the record indicates that the trial court did not abuse its discretion. In fact, appellant's specific reference to the record indicates that the trial court directed the witness, Dr. Vogelson, to answer

the question posed by appellant, and further requested clarification from Dr. Vogelson.

Eighth, appellant contends that the trial court unreasonably limited his visitation rights. Specifically, appellant claims that the visitation schedule is severely limited in that the schedule does not provide visitation for Christmas or Easter vacations, the children's birthdays, and national holidays; limits visitation during the children's summer vacations to two weeks; and requires appellee's written approval prior to removing the children from the Commonwealth. Appellant further asserts that this last limitation is unreasonable in light of the fact that appellant is a native of New York, his friends and family reside in New York, and appellee's cooperation will be difficult to secure as evidenced by appellee's interpretation of a previous order.

It "'has long been against public policy to limit or destroy the relationship between parent and child. . . . Every parent has the right to develop a good relationship with the child, and every child has the right to

develop a good relationship with both parents.' Therefore, to avoid unduly impinging upon a parent-child relationship, a court must sparingly impose restrictions an the relationship, . . ., and must furthermore impose the least intrusive restriction(s) reasonably necessary to assure the child's welfare." Fatemi v. Fatemi, 339 Pa.Super. 590, ___, 489 A.2d 798, 802 (1985), quoting Pamela J.K. v. Roger D.J., 277 Pa.Super. 579, 593, 419 A.2d 1301, 1309 (1980) (citation and footnote omitted). "[T]he party moving for the restriction on partial custody must show that the restriction is necessary to avoid detrimental impact on the child and that the content of the restriction manifests a reasonable relationship between the restriction and the avoidance of detrimental impact." Id. at ___, 489 A.2d at 802. The matter of scheduling, however, is best left to the discretion of the trial court. See Rosenberg v. Rosenberg, 350 Pa.Super. 268, 504 A.2d 350 (1986).

In the instant case, we find that the trial court did not abuse its discretion in framing a schedule whereby appellant has partial

custody of the children on alternating weekends from 6:00 p.m. Friday until 7:00 p.m on Sunday, Tuesday of mid-week dinner from 4:30 p.m. to 7:45 p.m., and for fifteen (15) uninterrupted days during the summer when the children are not attending school. In addition, we find the condition that:

> [Appellant] shall not remove the children from the Commonwealth of Pennsylvania, except when he visits his family in New Jersey, without written approval of mother. Such approval shall not be unreasonably withheld.[33]

is supported by the record as reasonably necessary to assure the children's welfare. On March 30, 1987, Dr. Schechter testified that he approved of the current partial custody schedule that is the same schedule in the trial court's final order.[34] In addition, Dr. Schechter recommended that appellant's partial custody of the children be subject to certain conditions including the condition that appellant not remove the children outside the Commonwealth of Pennsylvania without appellant's consent.[35] We further note that appellant's concern regarding the possibility that appellee may unreasonably withhold approval in the

future is unwarranted in light of the specified language in the trial court's order requiring that appellee's approval not be "unreasonably withheld." The trial court's order also enables appellant and his children to visit his family out-of-state.[36]

Appellant's final contention is that the record reflects that the trial judge was prejudiced towards appellant, "resulting in reversible error." We find appellant's contention waived. On December 11, 1986, appellant filed a motion to recuse the trial judge; however, on March 24, 1987, in open court, appellant confirmed that he had withdrawn his motion *by* letter:

> THE COURT: Before you proceed, there's one thing I wanted to put on the record. The last time we met in court we discussed [appellant's] motion for me to recuse myself. I've never officially ruled on that motion because I received a letter from [appellant] withdrawing that motion.
>
> Is that correct?
>
> [APPELLANT]: That's correct, your Honor.

N.T. March 24, 1987 at 6. Thus, the issue is waived. See Reilly by Reilly v. Southeastern Pa. Transp., 507 Pa. 204, 489 A.2d 1291 (1985).

In any litigation, the failure to preserve an issue on appeal will be excused if there is a strong public interest that outweighs the need to protect the judicial system from improperly preserved issues. Id. at ___, 489 A.2d at 1301. We recognize the strong public interest in maintaining the public's trust in the ability of our courts to decide cases without bias or illwill; however, we also reiterate our Supreme Court's concern as expressed in Reilly that "[c]harges of prejudice or unfairness made after trial expose the trial bench to ridicule and litigants the ability of our courts to decide cases without bias or illwill; however, we also reiterate our Supreme Court's concern as expressed in Reilly that "[c]harges of prejudice or unfairness made after trial expose the trial bench to ridicule and litigants to the uncertain collateral attack of adjudications upon which they have placed their reliance." Id. at ___, 489 A.2d at 1301. In Reilly, the Court held that "[o]nce the trial is completed with the entry of a verdict, a party is deemed to have waived his right to have a judge disqualified

and if he has waived that issue, he cannot be heard to complain following an unfavorable result." Id. at ___, 489 A.2d at 300. We find these same policy concerns applicable in a custody proceeding and, therefore, hold that, once a custody order has been issued and a party has waived his right to disqualify the trial judge, he cannot complain after the issuance of the order.[37]

Order affirmed.

McEWEN, J., CONCURS IN THE RESULT.

1 Act of November 5, 1981, P.L. 322, No. 115, Sec. 1001, et seq., 23 P.S. Sec. 1001, et seq., repealed, Act of October 30, 1985, P.L. 264, No. 66, Sec. 3, effective in 90 days. On July 22, 1985, appellee and appellant initiated proceedings by filing, respectively, a petition to confirm custody and a petition for custody and special relief.

2 Myron's date of birth is May 20, 1979. Sandra's date of birth is August 9, 1981.

3 At all times, appellee was represented by counsel.

4 Appellant was initially represented by counsel. On June 26, 1986, however, counsel filed a petition to withdraw. This petition was granted on August 7, 1986. On October 14, 1986, new counsel appeared on behalf of appellant. Subsequently, new counsel filed a petition to withdraw, which petition was granted on January 21, 1987.

5 The temporary order also served to vacate a previous ex parte temporary order dated July 11, 1985, granting joint custody to appellant and appellee, physical custody from Monday to Friday to appellant and physical custody from Friday until Monday to appellee.

6 Upon request of appellant, appellee had agreed to modify the existing visitation arrangement, and allowed appellant to pick up and deliver the children at appellee's residence.

7 The petition alleges in part:

> Unfortunately, on Sunday, August 4, 1985, when father returned the children at mother's home (where there was to be a birthday party for mother's uncle), father lost all control in the parking

> lot and, in the presence of the children, mother's family, and a neighbor, began screaming and yelling profanities at mother. Mother's father told father not to speak that way and with clinched fists, father started for mother's father to beat him up, when mother's uncle stepped in front of father to prevent the beating and put his hands on father's chest to restrain him, at which time father grabbed and held mother's uncle's wrists and hurt mother's uncle, causing mother's mother to run into the home to call the police.

Appellee's petition for special relief under Pa.R.C.P. 1915.13 at 2.

8 The trial court also ordered appellee to undergo counseling with Margaret Cooke, and further provided for Dr. Schechter, at the request of either party, to submit an updated evaluation to the trial court. We also note that the trial court issued a subsequent order whereby appellant was required to undergo psychotherapy at the direction of a different psychologist. This change was at appellant's request.

9 Dr. Vogelson diagnosed appellant as having a borderline personality disorder or antisocial personality disorder.

10 It has been held that the waiver doctrine is inapplicable in custody disputes. See Gunter v. Gunter, 240 Pa.Super. 382, 361 A.2d 307 (1976); In re Custody of Frank, 283 Pa.Super. 229, 423 A.2d 1229 (1980); but see Ellingsen v. Magsamen, 337 Pa.Super. 14, 486 A,2d 456 (1984). We, however, follow the rationale of our Supreme Court in Robinson v. Robinson, 505 Pa. 226, 478 A.2d 800 (1984). In Robinson, the Court held "that Superior Court erred by raising, sua sponte, issues respecting the propriety of the

trial court's admission and consideration of the home investigation reports and the school report cards." Id. at ___, 478 A.2d at 805. Although the issue in Robinson involved the failure to preserve an issue on appeal, we find its rationale applicable where an issue is not preserved at trial. In reaching its holding, our Supreme Court stated:

> We recognize that the ultimate issue in a custody contest between parents is that of whether the best interests of the child lie in granting custody to one parent or the other. Commonwealth ex rel. Pierce v. Pierce, 493 Pa. 292, 426 A 2d 555 (1981). We do not believe, however, that 'interminable and vexatious litigation,' which abrogation of the waiver doctrine would promote, is any better a method for achieving a just result in a child custody case than it would be in any other type of proceeding before the courts. See Daniel K.D. v. Jan M.H., 301 Pa.Superior Ct. 36, 40 n.2, 446 A.2d 1323 n.2 (1982).

Id. at ___, 478 A2d at 804.

11 Contrary to appellee's contention, the report cards in this matter do not constitute official records. Pursuant to 42 Pa.C.S.A. §6104, official records are defined as "a copy of a record of governmental action or inaction." The report cards of a private school do not constitute such a record.

12 Act of July 9, 1976, P.L. 586, No. 142, 42 Pa.C.S.A. §6108.

13 In its opinion, the trial court seriously questioned appellant's ability to appropriately discipline his children. It referred to a number of instances of record to support its factual conclusion including appellant's act of

"put[ting Myron's] head to the top of the bathroom toilet, and threaten[ing] to put Myron's face in the toilet. (N.T. 1/7/86, 249)." Trial court opinion at 16.

14 See McCormick, On Evidence, §262 (3 Ed. 1984) (admissions of a party come in as substantive evidence of the facts admitted).

15 The trial court responded to appellant's objection, stating: "I will allow it because I want to know what was recommended and what she did." N.T. April 6, 1987, at 101.

16 Appellant incorrectly alleges that section 1002 of the Custody Act creates a presumption in favor of joint custody. "Although shared custody in appropriate circumstances is desired, under the new legislation there is no presumption favoring shared custody." Wesley, 299 Pa. Super. at ___, 445 A2d at 1248.

17 Appellant also presents for our review a discussion of articles expressing the advantages of shared custody arrangements and the disadvantages of sole custody awards. We note, however, that the legislature recognized that a shared custody arrangement is not always in the best interest of the child and, therefore, provided the trial court broad discretion in its determination of when a shared custody award is appropriate. See Wesley, 2909 Pa.Super. 504, 445 A.2d 1243 (1982).

18 The trial court stated:

> Concerning father's fitness to parent, the court again notes that father is a poor role model who has trouble controlling his behavior. The court feels that father's behavior and attitudes would interfere with his ability to do what is in the children's best interests in their established schooling, religious upbringing, and social interaction. The court

recognizes that father is an intelligent man who loves his children and wants to be part of their lives; however, it is father's inability to control his emotions, his poor role modeling, as well as the fact that he and mother cannot agree on anything concerning child-rearing, that compels this court to grant mother sole legal custody.

Trial court opinion at 24.

19 See supra, note 6.

20 The trial court also mentioned the testimony of Hillel Raclaw, Ph.D., who testified on behalf of appellant. The trial court states:

> Dr. Raclaw's second report, the result of a home visit with father and children, dated July 31, 1986, concerned father's interaction with the parties' children regarding possible custodial arrangements. Dr. Raclaw took issue with the opinions of the previous experts and determined that father had the capacity to parent his children and was capable of caring for them on a 24 hour basis. (N.T. 1/26/87 - 498).

The trial court, however, continued:

> Notwithstanding certain inconsistencies among the expert testimony, the record clearly demonstrates that father has great difficulty responding rationally to emotional stress. There are several instances of record where father has used inappropriate conduct in the context of the situation.

Trial court opinion at 12. The trial court then proceeds to present examples of record.

21 Appellee testified:

> Q. How about Boy Scouts and Girl Scouts?
>
> A. [Appellant] said that - [appellant] stated that the children should join Orthodox Youth Groups, that Boy Scouts and Girl Scouts were not what he wanted them to be involved with.
>
> Q. And what is your view on that?
>
> A. I want them exposed to that. I think the Boy Scouts and Girl Scouts are excellent organizations.
>
> Q. Why will he not allow them to be in the Boy Scouts and Girl Scouts? What has he told you about that?
>
> A. He'd prefer them to be involved with the Orthodox Jewish children as opposed to being involved with a mixed group.

N.T. January 7, 1986, at 203-204.

22 Dr. Vogelson did not specifically recommend a particular custody arrangement.

23 Appellant acknowledges that the trial court referred in its opinion to the expert testimony of Hillel Raclaw, Ph.D., who testified on behalf of appellant.

24 Appellant also alleges that the trial court's opinion is replete with factual misstatements. We find that the trial court's factual findings, as reported in its opinion, are supported by the record.

25 Appellant also refers us to In re Custody of White, 270 Pa.Super. 165, 411 A.2d 231 (1-979). We find that White is distinguishable on the same basis as Kimmey. This Court in White remanded for the entry of a full opinion, finding that the trial court dwelled at length

on father's extramarital affairs that may have triggered the dissolution of the marriage, rather than "exploring the qualities of the parents which might best serve the children" and commenting "on whether it believed the children [were] adversely affected by appellant's affairs." Id. at ___, 411 A.2d at 233 (footnote omitted).

26 This Court in Newcomer stated:

> The lower court, in its opinion, merely mentioned the absconding of the child by Jeffrey King and concluded that 'the child should not be punished for the transgressions of a parent. We find this brief analysis to be insufficient in light of the court's award of custody to the father. The court's statement appears to imply that if a parent violates the law by kidnapping his or her child, and then remains in isolation for a substantial period of time, then, because of the importance of the element of stability, he or she will have a better chance of gaining permanent legal custody of the child. This is not the law. Except in unusual circumstances, estrangement of a child from either parent will not be sanctioned. Pamela J. K. v. Roger D. J. [277 Pa.Super. 579, 419 A.2d 1301 (1980)].

Id. at ___, 447 A.2d at 634.

27 The record does not substantiate appellant's allegations that appellee's counsel refused to withdraw as counsel for appellee nor that appellant retained the law firm in question.

28 On the record, appellee's counsel stated:

> I would like to put on the record that I advised [the trial court] and [appellant] of the fact that at the present time I am negotiating with the law firm of Abrams (sic) and Loewenstein on the basis of

possibly becoming a partner with that firm as of this date; however, there has been no concrete offer coming forth from that firm with respect to that.

However, in the course of the negotiations and discussing several cases, [this] case was mentioned and I discovered that sometime ago [appellant] met with Saul Levit in the Philadelphia office of Abrams (sic) and Loewenstein and asked Mr. Levit to review his case. And I understand that Mr. Levit did review it.

[Appellant] never in fact retained Mr. Levit or the law firm of Abrams (sic) and Loewenstein to actively represent him. [Appellant] has been represented by Lynne Gold-Bikin and Neil Hurowitz.

The reason for my bringing this up at this time is that I wanted to avoid any appearance of impropriety in the event that I should receive an offer and accept it. And if that were so, then I would assume that I would become a partner in Abrams (sic) and Loewenstein several months from today.

And in that event what I would contemplate at that time -- we could cross that bridge at that time of course -- is to have the file at Abrams (sic) and Loewenstein sealed by an order of court and the direction that I not discuss any information that was given to Mr. Levit about this case.

And I feel comfortable bringing it up now. Of course in the event I do not become a partner it couldn't have hurt to make this disclosure. . .

N.T. March 24, 1987, at 2-4.

29 Appellant also contends that he was prejudiced by the consequences of the temporary order. Specifically, appellant alleges that he was prejudiced by a six-month delay, and prejudiced as evidenced by the trial court's "indirect indication that [appellant's] failure to engage in therapy would substantially harm his chances of success in the case." Appellant's brief at 41. Appellant fails to substantiate his allegations by reference to the record nor does he explain how he was prejudiced by the six-month delay. We, therefore, do not reach this contention.

30 Act of December 6, 1972, P.L. 1339, No. 290, 1 Pa.C.S. Sec. 1501 et seq.

31 These factors include:

(1) The occasion and necessity for the statute.
(2) The circumstances under which it was enacted.
(3) The mischief to be remedied.
(4) The object to be attained.
(5) The former law, if any, including other statutes upon the same or similar subjects.
(6) The consequences of a particular interpretation.
(7) The contemporaneous legislative history.
(8) Legislative and administrative interpretations of such statute.

1 Pa.C.S.A. §1921(c).

32 During rebuttal, appellee testified:

Q: He said about the chores in the house, that he did it because you couldn't lift and you had no time or you had no energy.
A: As I said, again, the chores, he did fifteen to twenty percent of the time. One of our biggest areas of fighting was the fact that he was home a lot, he was playing tennis, playing chess, I was working, the children were at the baby-

sitter's, he wasn't even working, and in spite of all that, he really didn't do that much.

N.T. April 9, 1987, at 107.

The trial court limited rebuttal, stating:

I don't think we have to go through this kind of rebuttal. She admits he did it. There is a disagreement over percentages. And there, you get back into perceptions. And I am sure that any spouse in any marriage honestly believes they do more than they do or the other one doesn't do as much.

And I don't disagree that Mr. Schwarcz is generally concerned about his children, and that he loves them, and wants very much to be a part of their lives, and that he has done a number of things for them as they were growing up. As children grow older, their needs change. They don't need their diapers changed *anymore. And their needs when they go into their teens are different than their needs right now. And I don't think you have to spend a whole lot of time disputing what was done in the past.

The issues in this case are how both parties -- you have the issue concerning the Orthodox versus the Conservative, the religious issue, and whether shared legal custody would work. But in view of all the allegations about Mr. Schwarcz and the expert testimony, the critical issues are his mental ability, if the experts are right, and if they are wrong, how he reacts under stress and how he reacts emotionally, and whether he does color things. They are the things that I am really going to have to scrutinize the record over, not whether he changed diapers or did something eighty

percent of the time versus forty percent of the time.

And I don't dispute that he genuinely loves his children and cares for his children. And he's the father. He is entitled to have a relationship with his children. I don't think you have to spend a lot of time on that.

N.T. April 9, 1987, at 107-108.

33 Trial court order of November 16, 1987, at 25 (emphasis added).

34 Dr. Schechter testified:

In the best interest of the children, it would seem to me that the continuation of what was going on now might still be in their best interest since it's occasioned, and nothing has gone awry in terms of one measure of their success and their development. And that is, that at least academically, things are improving for both of them.

N.T. March 30, 1987 at 16-17.

35 Dr. Schechter testified regarding the basis of his recommendation:

I think that his impulse control certainly isn't that secure, that he necessarily could be expected not (sic) to maintain controls over that kind of impulse if he were especially angry, for example, at Dr. Schwarcz. I could imagine readily with the diagnosis that I have made and that Dr. Vogelson made, that this could occur.

N.T. March 30, 1987 at 21.

36 Contrary to appellant's contention, perusal of the record indicates that appellant is a

native of New Jersey, not New York, and that his sister resides in New Jersey.

37 The Court further held in Reilly that "recusal motions raised after verdict should be treated no different than other after acquired evidence situations which compel the proponent to show that: 1) the evidence could not have been brought to the attention of the trial court in the exercise of due diligence, and 2) the existence of the evidence would have compelled a different result in the case." Id. at ___, 489 A.2d at 1301. Instantly, appellant filed no motion subsequent to the issuance of the custody order. We, therefore, do not address this issue.

Supreme Court of Pennsylvania

Eastern District

Marlene F. Lachman, Esq.
Prothonotary
Patrick Tassos
Deputy Prothonotary

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April 11, 1989

Mr. Mark Schwarcz
1600 Church Road
Apt. B-113
Wyncote, PA 19095

RE: Harriet B. Schwarcz v. Mark L. Schwarcz, Petitioner,
Mark L. Schwarcz, Petitioner v.
Harriet B. Schwarcz
NO. 988 E.D. ALLOCATUR DOCKET 1988

Dear Mr. Schwarcz:

This is to advise you that the following order has been endorsed on the Petition for Allowance of Appeal filed in the above captioned matter:

"April 7, 1989

Petition Denied

Per Curiam."

Very truly yours,

/s/ Patrick Tassos,
Deputy Prothonotary

PT/rf
cc: Emanuel Bertin, Esq.
Hon. Joseph A. Smyth, Jr.